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Mental Health Law in Wisconsin:

A Guide for Legal and Healthcare Professionals

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State Bar of Wisconsin PINNACLE
5302 Eastpark Blvd., Madison, WI 53718
https://www.wisbar.org

© 2021 by the State Bar of Wisconsin
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First edition published 2021.

Printed in the United States of America
25 24 23 22 21 5 4 3 2 1
ISBN 978-1-57862-607-6
Library of Congress Control Number: 2021910942
Product Code AK0440

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Foreword

The topic of this book has long been off limits in society in general and, perhaps oddly, in the legal profession as well. Unfortunately, this has led to an avoidance of these important issues. Recognizing this, the State Bar of Wisconsin decided to address these issues candidly and openly. And, after careful research and countless hours of dedicated work by our volunteer authors and staff, we are proud to offer this important and long-overdue resource.

This book will be essential for attorneys, mental health professionals, judges, and families who are trying to navigate the labyrinth of mental health issues and their frequent intersection with the law. On behalf of the State Bar, we thank the authors: Court Commissioner Patrice Baker, Attorney Colleen Ball, Dr. Terri deRoon-Cassini, Judge Cynthia Davis, Attorney Andrew Hinkel, Attorney Kaitlin Lamb, Attorney Amanda Rabe Mayer, Attorney Amanda Pirt Meyer, Attorney Monica Murphy, Attorney Megan Sprecher, Attorney Tara Teesch, Judge Mary Triggiano, Attorney Evan Weitz, and Attorney Lauren Zwirlein. We are so fortunate to have this team of passionate, devoted, multidisciplinary experts. We also want to thank Wisconsin Supreme Court Justice Rebecca Grassl Bradley for her wise counsel and essential involvement throughout the various stages of the project.

We also thank the many individuals who took to the time to review and provide feedback on the original manuscript. Their involvement has ensured that we are bringing the users of this book an accurate, timely, and trustworthy product. Their names appear on the Acknowledgments page.

Finally, we'd like to acknowledge the members of the State Bar staff who worked tirelessly on the book. Thanks are due to attorney editors Margie DeWind, Rita Knauss, Hana Miura, and Carolyn Schwerman; lead production coordinator Lisa Lord; administrative assistant Kara Olson; and graphic artist Ben Oehmen. We especially thank former attorney editor Peggy Crooks-Mishacoff for identifying the need for this book and recruiting an expert team of authors and for her continued dedication to the completion of this project.

Carol A. Chapman, Esq.
Publications Manager
State Bar of Wisconsin

Preface

Mental Health Law in Wisconsin: A Guide for Legal and Healthcare Professionals is the brainchild of my University of Wisconsin Law School classmate, Peggy Crooks-Mishacoff. When Peggy contacted me to discuss her vision for this book, it seemed inconceivable that Wisconsin lacked a central exposition of the law related to mental health. Based on our involvement in the judicial system, we were able to

identify authors who were both knowledgeable and passionate about the subject matter. I am grateful for the time and energy contributed to this project by my judicial colleagues as well as some of the outstanding lawyers and advocates who work tirelessly in these important areas of the law.

Historically, manifestations of mental illness were regarded as weaknesses, deficiencies, or even vices rather than symptoms of health conditions. As a result, many people avoided seeking treatment. While societal perceptions continue to evolve as knowledge and awareness of mental health issues develop, a certain stigma endures. I observed this as a circuit court judge in Milwaukee County presiding in Children's Court. As one example, some children resented their diagnoses and resisted taking medications or receiving other treatment because they desperately wanted to be "normal." Analogizing mental health conditions to other medical issues like cardiovascular disease or cancer can help children (and adults) accept their conditions but of course monumental differences exist. Neither a heart attack nor diabetes triggers governmental intervention or imperils personal liberty, but fear of such consequences may discourage people with mental health needs from seeking treatment or other services.

My own awareness of mental health issues and the law developed in a professional setting as a member of the judiciary but like many Wisconsinites, I have encountered the intersection of mental health and the law within my extended family. Collectively, those experiences have made me acutely mindful of the importance of a knowledgeable bench and bar to serve the interests of those involved with or affected by mental health proceedings in our justice system. While a comprehensive understanding of the law is paramount, the value of developing an understanding of mental illness transcends commitment and guardianship cases. We have learned that many instances of criminal behavior may be rooted in mental illness or trauma, requiring advocates and judges to have some grounding not only in the legal aspects of mental health but in the medical and psychosocial sides as well.

In recent years, the Wisconsin Supreme Court has granted review in numerous chapter 51 cases in order to examine, interpret, and apply both statutory and constitutional law governing commitments. The prevalence of these cases before the state's highest court evidences the complexity of legal issues underlying proceedings involving mental health. It also reflects judicial recognition of the significant interests at stake in mental health cases. Undoubtedly, this book will prove to be a beneficial resource for lawyers, judges, social workers, and mental health professionals, as well as those with mental health conditions and their families who must navigate the justice system.

Hon. Rebecca Grassl Bradley
Wisconsin Supreme Court

About the Authors

Patrice A. Baker is in her 15th year serving the residents of Milwaukee County as a judicial court commissioner in the Probate Division. She is a 1988 graduate of Marquette University with a Bachelor of Science in Business Administration. She attended Marquette on a basketball scholarship. She is a 1991 graduate of Marquette University Law School. Before her employment with Milwaukee County, she was in private practice for 13 years. She currently serves on the Wisconsin Probate Benchbook Committee. She is an avid fan of the Green Bay Packers and the Marquette women's basketball team. She is the former board president for the National Alliance on Mental Illness-Greater Milwaukee.

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Chief Judge **Mary E. Triggiano** is a graduate of the University of Wisconsin Law School and has been a Milwaukee County Circuit Court judge since August 1, 2004. She was assigned to the Children's Division from August 2004 to August 2009. She was next assigned to the Domestic Violence Court, handling adult misdemeanor and felony domestic abuse and child abuse cases. From August 2013 to August 2017, she was again assigned to the Children's Court Division, where she led the Family Drug Treatment Court and created the first of its kind in Wisconsin Healthy Infant Court. From August 2017 to February 2020, she was assigned to the Civil Division. She was a Deputy Chief Judge for Chief Judge Maxine White for more than four years. She is currently the Chief Judge in Milwaukee County, appointed unanimously by the justices of the Wisconsin Supreme Court.

Evan Weitz graduated from the University of Wisconsin-Madison in 2008 with a degree in mechanical engineering. He received his Juris Doctor from DePaul University College of Law in 2011. Evan began working with the Wisconsin State Public Defender (SPD) in 2011 and worked in the Oshkosh trial office for four years before joining the Chapter 980 (Sexually Violent Person Commitments) unit in 2015. Evan

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How to Cite This Book

Cite this book in briefs and legal memoranda as follows:

Patrice A. Baker et al., *Mental Health Law in Wisconsin: A Guide for Legal and Healthcare Professionals* (2021).

[*See The Bluebook: A Uniform System of Citation* R. 15, B15.1 (Columbia Law Review Ass'n et al. eds., 21st ed. 2020).]

After the first full citation, you may cite this book as follows:

Mental Health Law in Wisconsin: A Guide for Legal and Healthcare Professionals, *supra*, § ____.

[*See The Bluebook: A Uniform System of Citation* R. 4.2(a), 15.10, B15.2 (Columbia Law Review Ass'n et al. eds., 21st ed. 2020).]

Chapter Acknowledgments

The authors acknowledge the following people for their contributions to their chapters.

Chapter 2: The authors thank reviewers and helpers Michael Tobin, retired deputy public defender and trial division director of the State Public Defender (SPD) and author of *Wisconsin Criminal Practice and Procedure*; Katie York, SPD Appellate Division director; and Matthew Giesfeldt and Eric Heywood, SPD trial lawyers who specialize in mental commitment proceedings.

Chapter 4: The author acknowledges the assistance of Robert B. Rondini, supervising attorney, policy development, Wisconsin Department of Safety and Professional Services; attorney Kathleen M. Quinn; Joan E. Zawikowski, assistant state public defender; and Pam Foti, neighbor and friend, in preparation and editing of the chapter.

Chapter 5: The author thanks Rebecca Glendon for her assistance researching and proofreading the chapter.

Chapter 6: The author thanks reviewers Dr. Kevin Miller, psychologist, and Elisabeth Stockbridge, local manager, Wisconsin State Public Defender's Office, Shawano.

Chapter 7: The author thanks her mentor and friend Anne Hartwig, her charismatic colleagues at Haskins Short & Brindley LLC, and her fellow NAMI Dane County board members for their invaluable advice and guidance.

Chapter 8: The author thanks Marquette Law School student Claire Barth.

Chapter 9: The authors thank attorney Alex Eichhorn, attorney James Brzezinski, and attorney Monica Irelan Karas for their legal insight and for their careful review of the chapter. They also thank attorney Anne Hartwig, the attorneys and staff at Haskins Short & Brindley LLC, and NAMI Dane County board members for their invaluable advice and guidance.

Chapter 10: The author acknowledges and thanks the Honorable Carl Ashley, Honorable Elliot Levine, Honorable Mary Triggiano, Honorable Michael Waterman, Commissioner J.C. Moore, and Cameron Overton (Milwaukee County's Drug Treatment Coordinator) for their valuable reviews of the chapter. The author also acknowledges Katy Burke, Wisconsin's Statewide Problem-Solving Court Coordinator, for her assistance with gathering helpful information.

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Chapter 1
Introduction: Mental Disorders and the Law

Terri A. deRoon-Cassini
Hon. Mary E. Triggiano

I. Mental Health and the General Population [§ 1.1]

In the United States (U.S.), mental health disorders are pervasive and affect every sector of society. Twenty percent of people in the U.S. are living with a mental health diagnosis, which can significantly range in severity. The severity of mental health disorders is defined by the level at which the mental health disorder interferes with the ability to function on a daily basis.

In a national study conducted in 2017, 46.6 million people in the U.S. were living with a mental health disorder currently or within the last year. Rates of mental health disorders vary based on gender, age, race, and ethnicity. For those living with any mental health disorder, women, individuals over the age of 50 years, and white Americans have the highest prevalence rates. When considering those who have the most severe mental health disorders, which are those having the greatest impairment in day-to-day functioning, females, people between the ages of 18 and 25 years, and individuals who identify with two or more races carry the largest burden of mental health disorder in society. Yet even more alarming is that 50% of adolescents in the U.S. have a lifetime prevalence of any mental health disorder. Kathleen R. Merikangas et al., *Lifetime Prevalence of Mental Disorders in U.S. Adolescents: Results from the National Comorbidity Survey Replication-Adolescent Supplement (NCS-A)*, J. Am. Acad. Child Adolescent Psychiatry 49(10): 980–89 (Oct. 2010), https://pubmed.ncbi.nlm.nih.gov/20855043/.

Mental disorders also constitute the greatest cause of disability in the U.S. and Canada. Ronald C. Kessler et al., *Lifetime Prevalence and Age-of-Onset Distributions of DSM-IV Disorders in the National Comorbidity Survey Replication*, Archives of Gen. Psychiatry 62(6): 593–602 (June 2005), https://pubmed.ncbi.nlm.nih.gov/15939837/; Substance Abuse & Mental Health Servs. Admin., *Key Substance Use and Mental Health Indicators in the United States: Results from the 2017 National Survey on Drug Use and Health*, HHS Pub. No. SMA 18-5068, NSUDH Series H-53 (Rockville, MD: Ctr. for Behavioral Health Statistics & Quality, 2018), https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHFFR2017/NSDUHFFR2017.pdf.

The most common mental health disorders include those classified as mood disorders, which are characterized by serious and persistent difficulty maintaining an even mood state. Depression, a common mood disorder, affects approximately 15 million adults in the U.S., or about 7% of the population, every year. Rates of anxiety-type disorders range anywhere from 1% to just over 7% of the population, and over 8% of the general population meets criteria for posttraumatic stress disorder (PTSD) following a traumatic event. Severe and persistent mental illness, such as schizophrenia and bipolar disorder, affect approximately 2.2 million and 1.8 million Americans, respectively. *See* William E. Narrow et al., *Revised Prevalence Estimates of Mental Disorders in the United States*, Archives of Gen. Psychiatry 59(2): 115–23 (2002); Ronald C. Kessler et al., *Twelve-Month and Lifetime Prevalence and Lifetime Morbid Risk of Anxiety and Mood Disorders in the United States*, Int'l J. Methods Psychiatric Rsch. 21(3): 16–84 (Sept. 2012).

And an even starker finding is that as of 2018, 5.8% of Americans had alcohol use disorder, a disorder that has significant health, financial, and societal implications. Nat'l Inst. on Alcohol Abuse & Alcoholism, *Alcohol Use Disorder*, https://www.niaaa.nih.gov/alcohols-effects-health/alcohol-use-disorder (last visited Mar. 16, 2021). Finally, when considering neurocognitive disorders that affect older adults, approximately 6.9% of Americans have dementia, and it is expected that by 2025, 7 million people over the age of 65 will be diagnosed with Alzheimer's disease. The reality is that mental health disorders are pervasive and varied in American society and having an understanding of mental health issues is paramount.

II. Vulnerable Populations in the Legal System [§ 1.2]

While mental health disorders are prevalent in the general U.S. population, they are even more prevalent in people who are part of the criminal justice population. According to Bureau of Justice Statistics, more than one-half of individuals involved in the criminal justice system suffer from a mental health disorder. U.S. Dep't of Just., *Bureau of Justice Statistics Special Report: Mental Problems of Prison and Jail Inmates* (Sept. 2006), https://www.bjs.gov/content/pub/pdf/mhppji.pdf. Although mental illness is not a strong predictor of criminal behavior, two million arrests each year in the U.S. involve persons with serious mental illness. These individuals often end up in the justice system instead of receiving the care they need to support their diagnosis and recovery. Dr. Altha Stewart, associate professor, Dep't of Psychiatry, and director, Ctr. for Health in Justice-Involved Youth, Univ. of Tenn. Health Sci. Ctr., Presider, Keynote Address at the National Stepping Up Summit, Washington, D.C. (Apr. 18, 2016).

In addition, of those individuals with serious mental health disorders, approximately 75% also have a co-occurring substance use disorder. Ram Subramanian et al*., Incarceration's Front Door: The Misuse of Jail in America* 12 (New York, NY: Vera Inst. of Just., 2015). As a result, these individuals are more likely to not make bail, to receive longer sentences, to not become eligible for early release from incarceration, to cycle through the system, and to be victimized. *Id.* at 11–13.

Mental health disorders in the juvenile justice system also are widespread. Approximately 50–75% of the 2 million youth subject to proceedings in the juvenile justice system meet criteria for a mental health disorder, which can lead to long-term involvement in the criminal justice system if left untreated. Johanna Wald & Daniel Losen, *Defining and Redirecting a School-to-Prison Pipeline*, New Dir. Youth Dev. 9–15 (2003), https://doi.org/10.1002/yd.51. Of those youth incarcerated, approximately 40–80% have at least one diagnosable mental health disorder. Linda A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, Archives of Gen. Psychiatry 59(12): 1133–43 (2002), https://jamanetwork.com/journals/jamapsychiatry/fullarticle/206941?resultClick=1.

These are the adults and youth who pass through courtrooms in the U.S. every day. With the rates and varied presentations of mental illness in the U.S., it is imperative that the legal system develop a deeper understanding of mental health and, in turn, work more effectively and compassionately to address the needs of justice-involved persons.

III. The Role of Trauma in Mental Health and the Law [§ 1.3]

It is worth noting that there has been much focus in recent years on the effects of trauma on justice-involved individuals and the importance of trauma-informed approaches. Like mental health disorders, trauma is widespread and particularly pervasive in the justice system. *Trauma* is defined as "actual or threatened death, serious injury, or sexual violence" that is experienced or witnessed by an individual or that happened to a loved one. Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)* 271–72 (5th ed. 2013).

This can include single events, such as gun violence, or sustained events, such as ongoing abuse or neglect.

Traumatic life experiences are common among justice-involved individuals with serious mental health disorders, substance use disorders, or both. Studies of people in the juvenile and criminal justice system reveal high rates of mental and substance use disorders and personal histories of trauma. Julian D. Ford & Charles Wilson, SAMHSA's Trauma and Trauma-Informed Care Experts Meeting (2012);

Julian D. Ford, *Treatment of Complex Trauma: A Sequenced, Relationship-Based Approach* (New York, NY, Guilford Press, 2013). Children and families in the child welfare system similarly experience high rates of trauma and associated behavioral health problems. Katie A. McLaughlin et al., *Childhood Adversity and Adult Psychiatric Disorder in the US National Comorbidity Survey*, Psych. Med. 40(4): 847–59 (2009).

Trauma histories of justice-involved individuals, especially those already suffering from mental illness, can contribute to the events leading to their appearance in the courtroom and shape their behavior once there. Understanding and practicing trauma-informed care when interacting with justice-involved individuals can lead to better outcomes. *See SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach* (July 2014) (Rockville, MD: Substance Abuse & Mental Health Servs. Admin.), https://ncsacw.samhsa.gov/userfiles/files/SAMHSA_Trauma.pdf.

Judges and attorneys, whether they are practicing in treatment courts or in traditional court settings, should engage people with histories of trauma by recognizing the presence of trauma symptoms and acknowledging the role that trauma has played in their lives. *See id.*

This is not to say that mental health diagnoses should excuse behavior, but understanding how mental health and mental illnesses can affect an individual can lead to a better understanding of how to move forward. It is important to consider that mental illnesses often manifest as dysregulation of emotions, behaviors, and thoughts. This triad of dysregulation leads to habits that can be difficult to break, and often these thoughts, behaviors, and emotions lead to further impairment in one's life. For example, someone who is suffering from the consequences of trauma can be depressed and will likely have an associated behavior, such as withdrawal or isolation, that downstream may lead to impairment in everyday functioning, such as absenteeism at work or withdrawal from important relationships. Behaving depressed then can lead to an individual feeling more depressed, and the illness continues. Similarly, when someone is feeling depressed, thoughts tend to be more depressive in nature, such as having a hopeless outlook, which can limit cognitive flexibility. From the outside, someone behaving and thinking this way might be viewed as having a lack of motivation, not being positive or engaged in life, and possibly not willing to take responsibility for themselves. This view can perpetuate the stigma associated with mental illness and continue a perspective that individuals with mental health diagnoses are to blame for their condition.

Trauma-informed care is often used as a supportive framework within treatment courts but can and should be applied throughout the justice system. Addressing trauma, as well as social determinants of health, such as housing and food security, is part of an integrated, whole-person approach to individuals participating in mental health courts.

Like trauma, stigma plays a significant role in a person's ability to seek help and live a meaningful and productive life. Stigma is a degrading and debasing attitude of society that discredits a person's dignity, marginalizes affected individuals, violates basic human rights, markedly diminishes the chances of a stigmatized person of achieving full potential, and seriously hampers the pursuit of happiness and contentment. Fraser W. Steel et al., *Combatting the Stigma of Mental Disorders—A Position Paper from the EFPSA Social Impact Initiative* 3 (Aug. 2015).

Additionally, stigma creates barriers to employment, safe housing, family engagement, connection to one's community, higher education, and so on. Understanding the effects of stigma is not merely an issue of societal compassion; it is a fundamental issue of equity and justice. Mental health disorders are chronic brain disorders affecting millions of individuals. Yet there are gaps in care and treatment services in every community, warranting collaboration now more than ever.

Readers of this book will learn about the laws affecting individuals with mental health disorders and the legal duties and responsibilities of lawyers and mental health professionals. But just as important, readers also will learn about how discrimination affects persons with mental illnesses or cognitive disabilities and thereby results in dire consequences. Finally, readers will learn about problem-solving courts, especially those addressing individuals with mental health disorders, including their use of trauma-informed care and procedural justice to better understand human behavior and provide better outcomes for people with mental health disorders.

More specifically, chapters 2 and 3 address the definitions, procedures, and issues surrounding mental health and sex offender commitments in Wisconsin under Wis. Stat. chs. 51 and 980. Chapter 4 covers guardianships of the person and estate, focusing primarily on adult guardianships, while chapter 5 addresses the special issues that arise when representing minors with mental health concerns. In chapter 6, the author explores the intersection of mental health issues and criminal law. Chapter 7 is devoted to discussing the legal duties and responsibilities of mental health professionals. Discrimination against persons with mental illnesses and other cognitive disabilities is the focus of chapter 8, and chapter 9 addresses benefits available for those individuals. The final chapter of the book is devoted to discussing treatment courts.

Chapter 2
Involuntary Civil Commitments

Colleen D. Ball
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I. Scope of Chapter [§ 2.1]

Chapter 51 of the Wisconsin Statutes is the State Alcohol, Drug Abuse, Developmental Disabilities and Mental Health Act. It regulates the government's ability to confine and treat an individual having a dangerous mental health condition against his or her will. The statute is long, dense, and complex. This chapter offers an overview of the provisions governing the involuntary civil commitment process for adults diagnosed with a mental illness, mental disorders, or developmental disabilities. It explains the commonly litigated provisions, notes case law essential to understanding those provisions, and highlights the substantive and procedural constitutional rights of individuals undergoing commitment. This chapter does not cover the voluntary admissions of adults, the commitment of minors (see chapter 5, *infra*), criminal commitments (see chapters 4 and 6, *infra*), or specialized commitments for individuals who are alcoholic or drug dependent (see chapters 8 and 10, *infra*). [1]

II. Introduction [§ 2.2]

Before the 1970s, the legal criteria for an involuntary commitment were not stringent. The government could confine an individual simply for being mentally ill. Then federal cases such as *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), and *O'Connor v. Donaldson*, 422 U.S. 563 (1975), dramatically changed the landscape of mental commitment law across the country. Recognizing that an involuntary commitment constitutes a massive curtailment of liberty, *Lessard* and *O'Connor* hold that the government may not confine a mentally ill individual unless he or she is currently dangerous to self or others.

Lessard declared chapter 51 unconstitutional and established minimum substantive and procedural rights for individuals undergoing involuntary commitment. In response, the Wisconsin Legislature repealed, recreated, and redesigned chapter 51 to advance two expressly stated policies. One is to provide a unified system of providing care and treatment to individuals suffering from mental illness, mental disorders, or developmental disabilities in the least restrictive alternative appropriate to their needs. Wis. Stat. § 51.001(1). The other is to protect the personal liberties of the person whom the government seeks to confine and treat. Wis. Stat. § 51.001(2).

The legislature recreated chapter 51 in the 1970s and has amended it many times since then. The Wisconsin Supreme Court provided a helpful history of these amendments in *Watts v. Combined Community Services Board*, 122 Wis. 2d 65, 362 N.W.2d 104 (1985), *Outagamie County v. Michael H. (In re Mental Commitment of Michael H.)*, 2014 WI 127, 359 Wis. 2d 272, 856 N.W.2d 603, and *Outagamie County v. Melanie L. (In re Mental Commitment of Melanie L.)*, 2013 WI 67, 349 Wis. 2d 148, 833 N.W.2d 607.

Many of chapter 51's provisions have not been tested against the U.S. Supreme Court precedent establishing fundamental constitutional rights for individuals undergoing commitment. Case law interpreting the statute is in flux. The Wisconsin Supreme Court will soon decide several cases that could significantly alter the rights of individuals undergoing commitment. All lawyers involved in a commitment proceeding—judges, corporation counsel, and defense counsel—must apply the statute carefully, informed by state and federal precedent, to ensure a fair commitment proceeding and an accurate result.

III. Initial Involuntary Commitments [§ 2.3]

A. In General [§ 2.4]

Wis. Stat. § 51.20 provides for different types of involuntary commitments. When a county seeks to confine and treat an individual who is not under a commitment order, it files a petition for an initial (or original) involuntary commitment. While different government entities may initiate an involuntary commitment proceeding, it is usually brought by a county, represented by corporation counsel. Thus, this chapter uses the term "county" generically to denote the party prosecuting the commitment proceeding.

B. Requirements for an Initial Involuntary Commitment [§ 2.5]

1. In General [§ 2.6]

Wisconsin's legal standard for an involuntary commitment is set forth in Wis. Stat. § 51.20(1). The individual must be (1) mentally ill, drug dependent, or developmentally disabled; (2) a proper subject for treatment; and (3) dangerous. Each of these terms has a specific definition under the law.

2. Mental Illness, Drug Dependence, or Developmental Disability [§ 2.7]

Mental illness is a "mental disease to such extent that a person so afflicted requires care and treatment for his or her own welfare, or the welfare of others, or of the community." Wis. Stat. § 51.01(13)(a). For purposes of an involuntary commitment, *mental illness* means "a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life, but does not include alcoholism." Wis. Stat. § 51.01(13)(b).

Drug dependence refers to "a disease that is characterized by a person's use of one or more drugs that is beyond the person's ability to control to the extent that the person's physical health is substantially impaired or his or her social or economic functioning is substantially disrupted." Wis. Stat. § 51.01(8). Chapter 51 does not define the term drug, but the court of appeals has held that it includes gasoline when a person uses it for huffing. *Marathon Cnty. v. Zachary W.*, No. 2014AP955, 2014 WL 6755242, ¶¶ 13, 17 (Wis. Ct. App. Dec. 2, 2014) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

Developmental disability refers to a disability "attributable to brain injury, cerebral palsy, epilepsy, autism, Prader-Willi syndrome, intellectual disability, or another neurological condition closely related to an intellectual disability or requiring treatment similar to that required for individuals with an intellectual disability." Wis. Stat. § 51.01(5)(a). The disability must continue or be expected to continue indefinitely, and it must be a substantial handicap to the individual. *Id.* Cerebral palsy, epilepsy, and dementia primarily caused by degenerative brain disorders do not qualify as "developmental disabilities" under this statute. Wis. Stat. § 51.01(5)(a), (b).

3. Proper Subject for Treatment [§ 2.8]

The "proper subject for treatment" element is often difficult to understand and apply. *Treatment* means "those psychological, educational, social, chemical, medical or somatic techniques designed to bring about *rehabilitation* of a mentally ill, alcoholic, drug dependent, or developmentally disabled person." Wis. Stat. § 51.01(17) (emphasis added). Thus, to be a proper subject for treatment, the individual must be "capable of rehabilitation." *Fond du Lac Cnty. v. Helen E.F. (In re Mental Commitment of Helen E.F.)*, 2012 WI 50, ¶ 30, 340 Wis. 2d 500, 814 N.W.2d 179.

If treatment will "'maximize[e] the[] individual functioning and maintenance' of the subject, but not 'help[] in controlling or improving their disorder[],' then the subject individual does not have rehabilitative potential, and is not a proper subject for treatment." *Id.* ¶ 36 (citation omitted). Chapter 55, which governs long-term protective placement and services, applies to individuals who fall into this category.

Conversely, if treatment will "'go beyond controlling … activity' and will 'go to controlling or improving their disorder[],' then the subject individual has rehabilitative potential and is a proper subject for treatment." *Helen E.F.*, 2012 WI 50, ¶ 36, 340 Wis. 2d 500. The focus on the individual's potential for rehabilitation furthers chapter 51's purpose, which is for the short-term commitment and treatment of people who can be reintegrated into society. *Id.* ¶¶ 21, 25.

Unfortunately, there is no clear line between mental conditions and treatments that fall under chapter 51 and those that fall under chapter 55 (Protective Service System). A court must evaluate each individual and case separately. *Waukesha Cnty. v. J.W.J. (In re Mental Commitment of J.W.J.)*, 2017 WI 57, ¶ 46, 375 Wis. 2d 542, 895 N.W.2d 783.

In one case, the court of appeals held that an individual with chronic paranoid schizophrenia was not a proper subject for treatment under chapter 51 because rehabilitation was not possible. *Milwaukee Cnty. Combined Cmty. Servs. Bd. v. Athans (In re Athans)*, 107 Wis. 2d 331, 333, 320 N.W.2d 30 (Ct. App. 1982). In other cases, appellate courts have declared individuals with chronic paranoid schizophrenia to be proper subjects for treatment. *See, e.g.*, *J.W.J.*, 2017 WI 57, ¶ 48, 375 Wis. 2d 542; *C.J. v. State (In re Mental Condition of C.J.)*, 120 Wis. 2d 355, 357, 362, 354 N.W.2d 219 (Ct. App. 1984).

In another case, the supreme court held that an individual with Alzheimer's disease was not a "proper subject for treatment" under chapter 51 because the condition is "incurable and untreatable" and "the only available medical remedy is maintenance—not treatment—of the disease." *Helen E.F.*, 2012 WI 50, ¶ 37, 340 Wis. 2d 500.

The court of appeals recently held that an individual who had autism, was nonverbal, had intellectual and developmental disabilities, had been diagnosed with obsessive-compulsive disorder and pica, and was the subject of a chapter 54 guardianship and a chapter 55 protective placement, was still a "proper subject for treatment" under chapter 51. Although the individual's intellectual and developmental disabilities could not be cured, the symptoms of pica and obsessive-compulsive disorder were controlled with medication. *Marathon Cnty. v. P.X. (In re Condition of P.X.)*, No. 2017AP1497, 2018 WL 3155825, ¶¶ 17–21 (Wis. Ct. App. Jun. 26, 2018) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

4. Dangerous [§ 2.9]

a. In General [§ 2.10]

A county must not confine people who are mentally ill simply because they behave differently or to ensure them a higher standard of living. To justify such a significant deprivation of liberty, the individual must also be "dangerous" to himself or others. *O'Connor v. Donaldson*, 422 U.S. 563, 575–76 (1975); *Addington v. Texas*, 441 U.S. 418, 426 (1979). Dangerousness is the most litigated issue in hearings under Wis. Stat. § 51.20.

For an initial commitment, the county must establish dangerousness under one of the five standards in Wis. Stat. § 51.20(1)(a)2.a.–e. Each standard requires proof of recent acts or omissions to indicate a "substantial probability" of a different type of harm. *Substantial probability* means "much more likely than not." *Marathon Cnty. v. D.K. (In re Condition of D.K.)*, 2020 WI 8, ¶ 35, 390 Wis. 2d 50, 937 N.W.2d 901 (citation omitted).

b. Threats or Acts of Suicide or Self-Harm [§ 2.11]

Under the first standard, an individual is dangerous if he or she shows "a substantial probability of physical harm to himself or herself as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm." Wis. Stat. § 51.20(1)(a)2.a.

The term *threat* means "an indication of impending danger or harm." *Outagamie Cnty. v. Michael H. (In re Mental Commitment of Michael H.)*, 2014 WI 127, ¶ 34, 359 Wis. 2d 272, 856 N.W.2d 603. The term *suicidal* means suicidal ideation whether or not accompanied with expressed intent to harm. Thus, the articulation of a specific plan is not necessary to constitute a threat under this provision. *Id.* ¶¶ 36–37.

c. Threats or Acts of Homicide or Harm to Others [§ 2.12]

Under the second standard, an individual is dangerous if there is a substantial probability that he or she will cause physical harm to other persons. This must be demonstrated with evidence that the individual has recently engaged in homicidal or violent behavior or with evidence that the individual has recently placed others in reasonable fear of violent behavior or serious physical harm. Wis. Stat. § 51.20(1)(a)2.b.; *Marathon Cnty. v. D.K. (In re Condition of D.K.)*, 2020 WI 8, ¶ 38, 390 Wis. 2d 50, 937 N.W.2d 901.

For example, a court-appointed psychiatrist's testimony that the individual threatened to strangle a police officer or kill people who made fun of him was sufficient evidence of dangerousness under this standard. *D.K.*, 2020 WI 8, ¶ 48, 390 Wis. 2d 50. The person in danger need not have subjective awareness of the threat. *R.J. v. Winnebago Cnty. (In re R.J.)*, 146 Wis. 2d 516, 523, 431 N.W.2d 708 (Ct. App. 1988).

In contrast, evidence that an individual was upset, angry, yelling and pointing a finger at another person did not satisfy this standard. *Milwaukee Cnty. v. Cheri V. (In re Mental Commitment of Cheri V.)*, No. 2012AP1737, 2012 WL 6571724, ¶ 17 (Wis. Ct. App. Dec. 18, 2012) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

d. Pattern of Acts Indicating Impaired Judgment [§ 2.13]

Under the third standard, an individual is dangerous if he or she shows such impaired judgment, as demonstrated by a pattern of recent acts or omissions, that there is a substantial probability of physical impairment or injury to himself or herself or to other persons. Wis. Stat. § 51.20(1)(a)2.c.

A diagnosis of schizophrenia and the general risks associated with schizophrenia do not satisfy this standard. *Langlade Cnty. v. D.J.W. (In re Mental Commitment of D.J.W.)*, 2020 WI 41, ¶¶ 53, 57, 391 Wis. 2d 231, 942 N.W.2d 277. "If it did, the statutory elements of mental illness and dangerousness would be merely redundant." *Id.* ¶ 57.

Evidence that a mentally ill individual who has never made threats or engaged in physical acts nevertheless makes other people feel uncomfortable, fearful, threatened, or motivated to defend themselves does not satisfy this standard. *Chippewa Cnty. v. M.M. (In re Mental Commitment of M.M.)*, No. 2017AP2018, 2018 WL 2046954, ¶ 20 (Wis. Ct. App. May 1, 2018) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

On the other hand, an individual's pattern of delusional paranoia, telling family members that people were out to get him, refusing medication and treatment, and saying that something was wrong with his head satisfied this standard. *Outagamie Cnty. v. Michael H. (In re Mental Commitment of Michael H.)*, 2014 WI 127, ¶ 40, 359 Wis. 2d 272, 856 N.W.2d 603.

e. Inability to Satisfy Basic Needs [§ 2.14]

Under the fourth standard, an individual is dangerous if the individual has engaged in recent behavior demonstrating that, due to mental illness, he or she is unable to satisfy basic needs for nourishment, medical care, shelter, or safety and, without prompt and adequate treatment, serious physical injury, debilitation, or disease is imminent. Wis. Stat. § 51.20(1)(a)2.d.

Evidence that despite freezing weather a homeless shelter would not accept a mentally ill individual, who wore tattered clothes and lacked the capacity to recognize reality and meet the ordinary demands of life, established that the individual was dangerous under this standard. *Vilas Cnty. Dep't of Human Servs. v. N.J.P. (In re Mental Commitment of N.J.P.)*, No. 2019AP1567, 2020 WL 7350100, ¶¶ 3, 19 (Wis. Ct. App. Dec. 15, 2020) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

In contrast, a county's evidence that an individual was unable to care for himself, unable to maintain a job, received disability benefits, and risked homelessness without the support of family did not establish dangerousness under this standard. *Langlade Cnty v. D.J.W. (In re Mental Commitment of D.J.W.)*, 2020 WI 41, ¶¶ 48, 53, 55, 56, 391 Wis. 2d 231, 942 N.W.2d 277.

f. Inability to Prevent Deterioration Leading to an Inability to Function [§ 2.15]

Whereas the first four standards require evidence that the individual has recently engaged in dangerous acts or omissions, the fifth standard authorizes an initial commitment *to prevent* the individual from deteriorating to the point that he or she cannot function independently in the community or will lack control over his or her thoughts or actions. Under the fifth standard, an individual is dangerous if he or she

- Is mentally ill;
- Is incompetent to make medication or treatment decisions;
- Demonstrates a substantial probability that he or she needs care or treatment to prevent further deterioration as evidenced by his or her treatment history and recent behavior; and
- Demonstrates a substantial probability that, without treatment, he or she will lack services necessary for care or safety and suffer severe mental, emotional, or physical harm that will result in an inability to function independently in the community or the loss of control over thoughts or actions.

Wis. Stat. § 51.20(1)(a)2.e.

The supreme court addressed the constitutionality of the fifth standard in *State v. Dennis H. (In re Commitment of Dennis H.)*, 2002 WI 104, 255 Wis. 2d 359, 647 N.W.2d 851. It held that the standard does not violate the 14th Amendment on substantive due process, vagueness, overbreadth, or equal protection grounds.

An individual's failure to take medication consistently is evidence that he or she will not take advantage of services in the community as the fifth standard requires. *Dane Cnty. v. Kelly M. (In re Mental Commitment of Kelly M.)*, 2011 WI App 69, ¶ 17, 333 Wis. 2d 719, 798 N.W.2d 697.

Caution. The Wisconsin Supreme Court recently clarified that an individual has a constitutional right to refuse medication even if he or she is incompetent to make medication or treatment decisions. *Winnebago Cnty. v. C.S. (In re Mental Commitment of C.S.)*, 2020 WI 33, ¶¶ 31–32, 391 Wis. 2d 35, 940 N.W.2d 875. Thus, *Kelly M.* might no longer accurately reflect the law.

The fifth standard does not apply to an individual who has a developmental disability, is dependent on drugs, is under a Wis. Stat. § 55.06 order for protective placement, or is eligible for such an order. *Kelly M.*, 2011 WI App 69, ¶ 32, 333 Wis. 2d 719. However, the fifth

standard does apply to an individual who has been diagnosed with both a mental illness and either a developmental disability or drug dependency. *Id.* ¶ 14.

C. Commencement of an Initial Commitment Proceeding [§ 2.16]

1. In General [§ 2.17]

Chapter 51 provides three ways to commence an initial commitment proceeding: (1) a law enforcement officer can file an emergency detention, (2) a hospital treatment director can file a "hold" of a voluntary patient, or (3) three people can file a three-party petition.

In any case, the county represents the public and drafts the necessary pleadings. Wis. Stat. § 51.20(4). Due process requires the county to "set forth the basis for detention with particularity." *Lessard v. Schmidt*, 349 F. Supp. 1078, 1092 (E.D. Wis. 1972).

2. Emergency Detention [§ 2.18]

A law enforcement officer or other person may take an individual into custody if the officer or other person has cause to believe the individual is (1) mentally ill, drug dependent, or developmentally disabled; (2) dangerous to himself or others as defined in Wis. Stat. § 51.15(1)(ar)1.–4.; and (3) reasonably believed to be unable or unwilling to cooperate with voluntary treatment. *See* Wis. Stat. § 51.15(1)(ag).

The officer's belief must be based on either

- A specific recent overt act or attempt or threat to act or omission by the individual which is observed by the officer, Wis. Stat. § 51.15(1)(b)1.; or
- A specific recent overt act or attempt or threat to act or omission by the individual that is reliably reported to the officer by any other person, including the individual's probation, extended supervision, or parole agent, Wis. Stat. § 51.15(1)(b)2.

In counties with a population of less than 750,000 (all Wisconsin counties other than Milwaukee County), the law enforcement officer files the statement of emergency detention with the circuit court having probate jurisdiction in the county of detention. This filing commences the action and has the same effect as the filing of a Wis. Stat. § 51.20 petition. The procedural requirements for this type of emergency detention are set forth in Wis. Stat. § 51.15(5).

In counties with a population of 750,000 or more (Milwaukee County), the law enforcement officer must deliver the statement of emergency detention to the detention facility, where the individual must be evaluated within 24 hours. Wis. Stat. § 51.15(4)(a), (b). If the treatment director or designee determines that the individual is eligible for commitment, the treatment director or designee must file the following documents with the circuit court having probate jurisdiction in the county of detention:

- The officer's statement of emergency detention;
- A supplement to the statement indicating whether the individual is mentally ill, developmentally disabled, or drug dependent along with any additional information; and
- A notification of the detention.

The filing of the statement and notification has the same effect as the filing of a Wis. Stat. § 51.20 petition. The procedural requirements for this type of emergency detention are set forth in Wis. Stat. § 51.15(4)(b) and (c).

Practice Tip. In all counties, if the officer who signed the statement of emergency detention does not have personal knowledge of the conduct justifying the detention, the circuit court should dismiss the proceeding. *Milwaukee Cnty. v. Parham (In re Parham)*, 95 Wis. 2d 21, 26, 289 N.W.2d 326 (Ct. App. 1979).

3. Treatment Director Hold on a Voluntary Patient [§ 2.19]

An individual may voluntarily admit himself or herself to a treatment facility. If the director or designee of the treatment facility determines that such an individual is eligible for an emergency detention under Wis. Stat. § 51.15(1), the director or designee may sign a statement of emergency detention and detain the individual for evaluation, diagnosis, and treatment. In this situation, the treatment director

undertakes the responsibilities required of a law enforcement officer and must promptly file the statement of emergency detention with the circuit court having probate jurisdiction in the county of detention. Wis. Stat. § 51.15(10).

4. Three-Party Petition [§ 2.20]

Three people may initiate an involuntary commitment proceeding by asking corporation counsel to draft a petition to have the individual examined to determine whether he or she should be involuntarily committed. Wis. Stat. § 51.20(1)(b), (4). Except in limited circumstances, corporation counsel must represent the public in all chapter 51 proceedings and must draft all necessary papers for the action. Wis. Stat. § 51.20(4). Corporation counsel need not represent the public when he or she does not believe that involuntary commitment is appropriate. Wis. Stat. § 51.20(4)(b).

Note. If someone other than corporation counsel drafts a petition for commitment or recommitment, the circuit court must refuse it—even without a showing of prejudice. *D.S. v. Racine Cnty. (In re D.S.)*, 142 Wis. 2d 129, 416 N.W.2d 292 (1987) (commitment); *State v. S.P.B. (In re S.P.B.)*, 159 Wis. 2d 393, 464 N.W.2d 102 (Ct. App. 1990) (recommitment).

The petition for examination must allege that the individual is (1) mentally ill, (2) a proper subject for treatment, and (3) dangerous under one of the five standards of dangerousness in Wis. Stat. § 51.20(1)(a)2a.–e. The petition must also contain "a clear and concise statement of facts which constitute probable cause to believe the petition." Wis. Stat. § 51.20(1)(c).

The petition must be signed by three people, and one of the signers must have personal knowledge of the events described in it, unless it is filed pursuant to a court order under Wis. Stat. § 938.30(5)(c)1. or (d)1., which concern the competency of individuals in juvenile proceedings. Wis. Stat. § 51.20(1)(b). The petition "shall be sworn to be true." Wis. Stat. § 51.20(1)(c).

The petition must state the names and mailing addresses of the petitioners and their relation to the individual. The petition must also state the names and mailing addresses of the individual's spouse, adult children, parents or guardian, custodian, siblings, person in the place of a parent, and person with whom the individual lives or resides. If this information is unknown or inapplicable, the petition must so state. Wis. Stat. § 51.20(1)(c).

5. Venue [§ 2.21]

A petition for examination "may be filed in the court assigned to exercise probate jurisdiction for the county where the subject individual is present or the county of the individual's legal residence." Wis. Stat. § 51.20(1)(c).

There are no cases interpreting this provision, and it does not indicate the point in time when the individual's presence or residence is measured. However, the supreme court interpreted an analogous statute using the same language to mean that venue is determined by the individual's presence or legal residence when the petition was filed. *State v. Corey J.G. (In Interest of Corey J.G.)*, 215 Wis. 2d 395, 410, 419, 572 N.W.2d 845 (1998) (applying Wis. Stat. § 48.185(1) (1993–94)).

6. Detention for a Commitment Proceeding [§ 2.22]

After the filing of a petition for examination, either the circuit court or a court commissioner must review it within 24 hours (excluding Saturdays, Sundays, and legal holidays) to determine whether there is "cause to believe" that the individual meets the requirements for an initial commitment. Wis. Stat. § 51.20(2)(a). The court must order the individual's detention only "based upon specific recent overt acts, attempts or threats to act or on a pattern of recent acts or omissions made by the individual." *Id.*

If the court issues a detention order, then a law enforcement officer must take the individual into custody and present him or her with the following:

- A copy of the court's detention order;
- A copy of the petition;
- A notice of hearing; and
- A written statement of the individual's right to (1) an attorney, (2) a jury trial if requested more than 48 hours before the final hearing, (3) the legal standard on which the individual can be committed, and (4) a probable cause hearing within 72 hours after being taken into custody under Wis. Stat. § 51.15 (excluding Saturdays, Sundays, and legal holidays). (*See* Wis. Stat. § 801.15(1)(a) for the definition of "holiday.")

The law enforcement officer must also orally inform the individual of these rights. Wis. Stat. § 51.20(2)(b).

If the court does not issue a detention order, the law enforcement officer must serve the same documents on the individual and orally inform the individual of the same rights. Wis. Stat. § 51.20(2)(c).

The individual and the individual's attorney must receive notice of commitment proceedings. The notice may be given by telephone, if the person providing the notice places in the case file a signed statement indicating the time the notice was given and the person or persons spoken with. Wis. Stat. § 51.20(2)(b). Notice of the time and place of the probable cause hearing must be personally served on the individual and the individual's attorney within a reasonable time before the hearing. *Id.* The county must also notify the individual and the individual's attorney of the time and place of the final hearing within a reasonable time before the hearing. Wis. Stat. § 51.20(10)(a).

Even without a detention order, a law enforcement officer must take the individual into custody if the officer has cause to believe that the individual is mentally ill, drug dependent, or developmentally disabled and eligible for commitment under Wis. Stat. § 51.20(1)(a), "based upon specific recent overt acts, attempts or threats to act or on a pattern of recent acts or omissions made by the individual." Wis. Stat. § 51.20(2)(c). If the individual is detained, the staff at the facility where the individual is detained must orally inform the individual of the statutory rights and serve the individual with a copy of all documents required by this section. *Id.*

D. Probable Cause Hearings [§ 2.23]

1. Hearing Requirements [§ 2.24]

Wis. Stat. § 51.20(5) prescribes requirements for probable cause hearings. These requirements are addressed in section 2.65, *infra*.

2. Hearing Deadlines and Circuit Court Competency [§ 2.25]

a. In General [§ 2.26]

If the circuit court violates a prescribed time period for holding a probable cause hearing, it loses competency to adjudicate the commitment proceeding and must dismiss the proceeding. *Dodge Cnty. v. Ryan E.M. (In re Mental Commitment of Ryan E.M.)*, 2002 WI App 71, ¶ 12, 252 Wis. 2d 490, 642 N.W.2d 592.

b. When the Individual is Detained [§ 2.27]

If a law enforcement officer or other authorized person detains the individual pursuant to a Wis. Stat. § 51.20(1) petition for examination, a Wis. Stat. § 51.15 emergency detention, or other Wis. Stat. § 51.20 procedure, the court must hold a hearing within 72 hours after the individual is taken into custody, excluding Saturdays, Sundays, and legal holidays, to determine whether there is probable cause to believe the allegations of Wis. Stat. § 51.20(1)(a). Wis. Stat. § 51.20(7)(a).

A county must not exclude the day of detention from the calculation. *Dodge Cnty. v. Ryan E.M. (In re Mental Commitment of Ryan E.M.)*, 2002 WI App 71, 252 Wis. 2d 490, 642 N.W.2d 592; *see also Dane Cnty. v. Stevenson L.J. (In re Mental Commitment of Stevenson L.J.)*, 2009 WI App 84, ¶ 11, 320 Wis. 2d 194, 768 N.W.2d 223. Nor may the county reset the clock by filing a substantially identical successive petition for examination. *Stevenson L.J.*, 2009 WI App 84, ¶ 13, 320 Wis. 2d 194.

The individual is deemed "in custody" when he or she is under the physical control of a law enforcement officer or other person authorized to make an emergency detention. Wis. Stat. § 51.15(3).

Caution. In 2013, the legislature amended Wis. Stat. § 51.15(3), (4)(b), and (5) to provide that the 72-hour clock is triggered when a law enforcement officer takes the individual into physical custody. Under the prior version of the statute, the individual's arrival at the detention facility triggered the 72-hour clock. Be aware that older cases such as *Ryan E.M.*, 2002 WI App 71, ¶ 5, 252 Wis. 2d 490, and *Milwaukee County v. Delores M. (In re Delores M.)*, 217 Wis. 2d 69, 72, 577 N.W.2d 371 (Ct. App. 1998), are based on the prior statute and incorrectly state the trigger point.

c. When the Individual Is Not Detained or Is an Inmate [§ 2.28]

If the individual is not detained, or if the individual is an inmate of a state prison, jail, or house of correction, then the court must hold the probable cause hearing "within a reasonable time of the filing of the petition." Wis. Stat. § 51.20(7)(b).

d. When the Individual Requests Postponement [§ 2.29]

Either the individual or the individual's attorney may request a postponement of the probable cause hearing. In no event may the postponement exceed seven days from the date of detention. Wis. Stat. § 51.20(7)(a).

The parties may waive the 72-hour period for a probable cause hearing if they enter a settlement agreement under Wis. Stat. § 51.20(8)(bg).

3. Probable Cause Standard [§ 2.30]

The purpose of the probable cause hearing is to determine whether the government has sufficient evidence to justify detention of the individual for an involuntary commitment hearing. Thus, the circuit court looks for evidence of the allegations made in the petition filed under Wis. Stat. § 51.20(1)(a)—that the individual is (1) mentally ill, (2) a proper subject for treatment, and (3) dangerous under one of the five standards of dangerousness in Wis. Stat. § 51.20(1)(a)2a.–e.

There does not appear to be case law defining "probable cause" for a chapter 51 involuntary commitment. In criminal cases, "probable cause" means more than a mere possibility or suspicion that a defendant committed a crime but not proof beyond a reasonable doubt. The test is an objective examination of the totality of the circumstances. *State v. Weber*, 2016 WI 96, ¶ 20, 372 Wis. 2d 202, 887 N.W.2d 554. It is a "flexible, common-sense measure of the plausibility of particular conclusions about human behavior." *Id.* (quoted source omitted).

4. Probable Cause Dispositions [§ 2.31]

a. Individual Fails to Appear [§ 2.32]

If the individual fails to appear for the probable cause hearing, the court may issue an order for the individual's detention and must hold a hearing within 48 hours, excluding Saturdays, Sundays, and holidays, from the time the individual was detained. Wis. Stat. § 51.20(7)(c).

b. Circuit Court Finds Probable Cause for Commitment [§ 2.33]

If the court determines that there is probable cause to believe the allegations made under Wis. Stat. § 51.20(1), it must appoint two examiners to examine the individual pursuant to Wis. Stat. § 51.20(9)(a). The circuit court must also schedule a final hearing within 14 days after the time the individual was detained. Wis. Stat. § 51.20(7)(c). There are several exceptions to this 14-day rule. They include the following:

- If the circuit court postponed the probable cause hearing pursuant to Wis. Stat. § 51.20(7)(a), the court must schedule the hearing within 21 days after detention. Wis. Stat. § 51.20(7)(c).
- If an individual requests a jury trial later than 5 days after detention, the final hearing must be held within 14 days after the date of demand. Wis. Stat. § 51.20(11)(a).
- After finding probable cause, the court may release the individual pending the final hearing and issue an order stating conditions for release. A final hearing must be held within 30 days after the order. Wis. Stat. § 51.20(8)(a).
- If the individual was not detained under Wis. Stat. § 51.15 or 51.20, or if the individual is an inmate of a state prison, county jail, or house of corrections, the court must schedule the hearing within 30 days after the probable cause hearing. Wis. Stat. § 51.20(7)(c).

The parties may waive the 14-day period for holding a final hearing if they enter a "hold open" agreement under Wis. Stat. § 51.20(8)(bg).

c. Circuit Court Finds Probable Cause for Guardianship and Protective Placement [§ 2.34]

If the court determines that there is no probable cause for an involuntary mental commitment but there is probable cause for a guardianship and protective placement or services, it may appoint a temporary guardian for the individual and order temporary protective placement or services under chapter 55. Wis. Stat. § 51.20(7)(d).

Note. The circuit court may also appoint a temporary guardian for the individual and order temporary protective placement or services after a final commitment hearing. *See* Wis. Stat. § 51.67. However, these provisions are not the same. For example, the Wis. Stat. § 51.20(7)(d) standard for ordering involuntary medication is more stringent than the Wis. Stat. § 51.67 standard. Additionally, under Wis. Stat. § 51.67 the person may remain in a treatment facility during the 30-day temporary order if no other appropriate facility is available.

d. Circuit Court Finds Probable Cause for Treatment for Alcoholism or Drug Dependence [§ 2.35]

If the court determines that there is no probable cause for an involuntary mental commitment but there is probable cause that the individual is a fit subject for treatment for alcoholism or drug dependence, it must proceed as if a petition were filed under Wis. Stat. § 51.45(13).

e. Court Finds No Probable Cause [§ 2.36]

If the court determines there is no probable cause to believe the allegations under Wis. Stat. § 51.20(1) or to proceed under Wis. Stat. § 51.20(7)(d), the court must dismiss the proceeding. Wis. Stat. § 51.20(7)(e).

5. Review of Probable Cause Finding [§ 2.37]

Either a circuit court judge or a circuit court commissioner may conduct a chapter 51 probable cause hearing. Wis. Stat. § 757.69.

If a court commissioner conducts the hearing, the individual may ask the circuit court to conduct a de novo review of the probable cause finding. However, the circuit court has the discretion to deny the review hearing. *Milwaukee Cnty. v. Louise M. (In re Commitment of Louise M.)*, 205 Wis. 2d 162, 176, 555 N.W.2d 807 (1996). When deciding whether to hold the hearing, the circuit court should consider the following:

- The severity of the conditions of confinement, including the type and amount of psychotropic medication being administered to the individual;
- The amount of time that elapsed between the detention and the probable cause hearing;
- Whether the individual has requested a jury trial, which could lengthen the time of detention; and
- The extent of the testimony at the probable cause hearing.

Id. at 177.

If the circuit court chooses to conduct a de novo review hearing, it must do so "within a reasonable time" before the final hearing or jury trial. *Id.* at 178. Before rendering a decision, the circuit court should review the statement of emergency detention, petition for examination, physicians' reports, and the record of the probable cause hearing. *Id.* at 177–78 & n.7.

The circuit court's finding of probable cause is a nonfinal order. *Id.* at 171. To appeal a nonfinal order, the individual must file a petition for leave to appeal pursuant to Wis. Stat. §§ 808.01(1) and 809.50.

E. Examination of the Individual [§ 2.38]

1. Determination of Insurance [§ 2.39]

The circuit court may not order the individual to be examined, evaluated, or treated for a "nervous or mental disorder" unless the court first attempts to determine whether the individual is enrolled in a health maintenance organization, limited service health organization, or preferred provider plan. If the individual is enrolled, the court must also notify the plan or organization that the individual is in need of examination, evaluation, and treatment for a nervous or a mental disorder. Wis. Stat. § 51.20(7)(am).

2. Appointment of Examiners [§ 2.40]

If the circuit court finds probable cause to believe the allegations made under Wis. Stat. § 51.20(1), it then appoints two examiners to personally examine the individual. Wis. Stat. § 51.20(9)(a)1. The examiners must be

- Two licensed physicians specializing in psychiatry;
- One licensed physician and one licensed psychologist;
- Two licensed physicians, one of whom has specialized training in psychiatry; or
- If a psychologist or psychiatrist is unavailable, two licensed physicians.

Id.

The examiners must have "specialized knowledge determined by the court to be appropriate to the needs of the subject individual." *Id.* The examiners may not be related to the individual by blood, adoption, or marriage. Examiners may not hold an interest in the individual's property. *Id.*

Practice Tip. Consider whether the court-appointed examiners have the "specialized knowledge" necessary to give an opinion about the individual's particular mental illness, developmental disability, or drug problem. If not, consider challenging the examiner's testimony under Wis. Stat. § 907.02(1) and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

3. Nomination of Court-Appointed Examiner [§ 2.41]

The individual may nominate one of the two court-appointed examiners. Wis. Stat. § 51.20(9)(a)2. However, the individual must make his or her selection known to the court within 24 hours after completion of the probable cause hearing. The nominated examiner must be available and meet the requirements of Wis. Stat. § 51.20(9)(a)1.

4. Request for Independent Examiner [§ 2.42]

The individual has a right to an independent medical or psychological examination at his or her own expense, if requested by the individual, by the individual's attorney, or any other interested party with the circuit court's permission. If the individual is indigent, the court must approve the request at the reasonable expense of the individual's county of legal residence. The independent examiner's personal testimony may be offered as evidence at the final hearing. Wis. Stat. § 51.20(9)(a)3.

5. Examination Requirements [§ 2.43]

a. Notice of the Examination [§ 2.44]

If the individual is not detained for the final hearing, the circuit court "shall designate the time and the place where the examination is to be held and shall require the individual's appearance." Wis. Stat. § 51.20(9)(a)5.

Practice Tip. Circuit courts sometimes omit the time and place of examination from their orders. If this occurs, attorneys should bring it to the court's attention to have it remedied.

b. Notice of Rights [§ 2.45]

Pursuant to Wis. Stat. § 51.20(9)(a)4., before beginning an examination, the examiner must inform the individual of the following:

- The individual has a right to remain silent.
- The individual's statement may be used as a basis for commitment.
- The examiner must make a report to the court even if the individual remains silent.

The issuance of this warning before an examination establishes a presumption that the individual understands that he or she need not speak to the examiner. *Id*.

c. Examiner's Duties [§ 2.46]

The examiner must receive access to the individual's treatment records and "personally observe and examine" the individual at any suitable place. Wis. Stat. § 51.20(9)(a)5.

Practice Tip. Sometimes the individual is examined remotely via videoconference. This might not satisfy the "personally observe and examine" requirement. Counsel should explore possible limitations of a video examination. For example, a video examination does not permit a physical examination, which might reveal causes of a mental health problem or health conditions that may affect the choice of medication. Also, the camera view may prevent the examiner from observing side effects from medication. Such limitations could affect the admissibility or weight of the examiner's evaluation.

Pursuant to Wis. Stat. § 51.20(9)(a)5. and (b), examiners' reports must meet the following requirements:

- Reports must be in writing and filed with the court.
- Reports must be independent of each other.
- Reports must state whether the individual is (1) mentally ill, developmentally disabled, or drug dependent; (2) a proper subject for treatment; and (3) dangerous.
- Reports must state the appropriateness of various treatment modalities and facilities.
- Reports and testimony, if any, shall be based on beliefs to a reasonable degree of medical certainty for physicians and of professional certainty for psychologists. If the examiners are unable to make conclusions to the required degree of certainty, they shall state that fact in their reports and testimony, if any.
- If the examiner determines that an individual is a proper subject for treatment, the examiner must recommend the appropriate level of treatment, including the level of inpatient facility that provides the least restrictive environment consistent with the individual's needs and the name of the facility where the individual should be received.
- An examiner's report may be based on hearsay, but the hearsay itself is not admissible evidence. *S.Y. v. Eau Claire Cnty. (In re Condition of S.Y.)*, 156 Wis. 2d 317, 327–28, 457 N.W.2d 326 (Ct. App. 1990), *aff'd*, 162 Wis. 2d 320, 469 N.W.2d 836 (1991).
- An examiner's report may not be used as a conduit for the opinions of other professionals who have examined the individual. If the examiner relies on the opinions of other psychologists and psychiatrists, due process requires the examiner to independently confirm the facts on which those opinions are based. *Walworth Cnty. v. Therese B. (In re Guardianship of Therese B.)*, 2003 WI App 223, ¶ 16, 267 Wis. 2d 310, 671 N.W.2d 377.
- An examiner's report is inadmissible hearsay unless the examiner testifies and is available for cross-examination. *R.S. v. Milwaukee Cnty. (In re Guardianship of R.S.)*, 162 Wis. 2d 197, 470 N.W.2d 260 (1991).

F. Dispositions of Petition for Initial Commitment [§ 2.47]

1. In General [§ 2.48]

Wis. Stat. § 51.20(13) lists possible dispositions for a commitment proceeding depending on the facts of the individual's case. Only the most common dispositions are mentioned here.

2. Dismissal of the Petition [§ 2.49]

If the county fails to prove one or more of the elements of Wis. Stat. § 51.20(1)(a), the circuit court should dismiss the petition for initial commitment. Wis. Stat. § 51.20(13)(a)1. The individual may agree to remain in the facility where he or she was detained for the hearing until alternative plans for his or her care can be made. Wis. Stat. § 51.20(13)(b).

3. Conversion to Guardianship and Protective Placement [§ 2.50]

If the court finds that commitment under chapter 51 is not warranted but the individual is a fit subject for guardianship and protective placement, the court may appoint a temporary guardian and order protective placement or services for a period not to exceed 30 days as provided in Wis. Stat. §§ 51.20(13)(a)2. and 51.67.

Note. Wis. Stat. § 51.67 contains its own standard for involuntary medication or treatment, and the standard is different than the standards in Wis. Stat. §§ 51.20(7)(d) and 51.61(1)(g)3.

4. Commitment of the Individual [§ 2.51]

If the county proves the elements of Wis. Stat. § 51.20(1)(a), the circuit court may order commitment of an individual who is not an inmate to the care and custody of the appropriate county department. If inpatient care is not required, the court may commit the individual

to outpatient treatment under the care of the county department. Wis. Stat. § 51.20(13)(a)3. Regardless of the level of care required, an initial commitment may not exceed six months. Wis. Stat. § 51.20(13)(g)1.

The individual has a due-process right to a written statement of the evidence that the fact-finder relied on for the commitment. *Vitek v. Jones*, 445 U.S. 480, 495 (1980).

The court must designate the facility or service that is to receive the individual into the mental health system, subject to Wis. Stat. § 51.06(3). Wis. Stat. § 51.20(13)(c)1.

The county department under Wis. Stat. § 51.42 or 51.437 must arrange for treatment in the least restrictive manner consistent with the individual's requirements and in accordance with any court order designating the maximum-level inpatient facility that may be used for treatment, subject to Wis. Stat. § 51.06(3). Wis. Stat. § 51.20(13)(c)2. The county department has a continuing obligation to treat the individual in a way that least restricts his or her personal liberties consistent with his or her needs. Wis. Stat. § 51.20(13)(f).

The appropriate county department under Wis. Stat. § 51.42 or 51.437 must report the initial plan of treatment for the individual to the court. Wis. Stat. § 51.20(13)(c)3.

5. Conditional Transfer [§ 2.52]

If the court finds that the individual's dangerousness is likely to be controlled with appropriate medication administered on an outpatient basis, it may order the county department or the Wisconsin Department of Health Services (DHS) to release the individual on a conditional transfer, after a facility evaluates him or her and develops an appropriate treatment plan. See Wis. Stat. §§ 51.20(13)(dm) and 51.35(1) for additional rules regarding conditional transfers.

IV. Recommitments [§ 2.53]

A. In General [§ 2.54]

Before the expiration of an initial commitment, the county may petition to extend it for up to 12 months. Chapter 51 refers to this as a recommitment (or sometimes as an extension of commitment). There is no statutory limit on the number of times a court may recommit an individual.

B. Requirements for a Recommitment [§ 2.55]

At the recommitment stage, the government must prove the same three elements with the same quantum of proof as at the commitment stage. It must prove that the individual is currently (1) mentally ill, (2) a proper subject for treatment, and (3) dangerous. *Portage Cnty. v. J.W.K. (In re Mental Commitment of J.W.K.)*, 2019 WI 54, ¶¶ 17–18, 24, 386 Wis. 2d 672, 927 N.W.2d 509.

At the recommitment stage, the county may prove the "dangerous" element in one of two ways. The county may prove that the individual satisfies one of the five standards of dangerousness for an initial commitment in Wis. Stat. § 51.20(1)(a)2a.–e. Or the county may satisfy Wis. Stat. § 51.20(1)(am), which is known as the "alternate standard of dangerousness."

The alternate standard provides that if the individual has been the subject of a commitment order immediately before the commencement of the recommitment proceeding, the county need not prove that he or she is currently dangerous under one or more the five standards of dangerousness for an initial commitment. Wis. Stat. § 51.20(1)(am).

Note. The Wisconsin Supreme Court has held that Wis. Stat. § 51.20(1)(am) does not violate 14th Amendment substantive due process or equal protection. *Waupaca Cnty. v. K.E.K. (In re Mental Commitment of K.E.K.)*, 2021 WI 9, 395 Wis. 2d 460, 954 N.W.2d 366.

If the county petitions to recommit an individual under Wis. Stat. § 51.20(1)(am), it must specify which of the standards of dangerousness in Wis. Stat. § 51.20(1)(a)2.a.–e. the individual would meet if treatment were withdrawn. *Langlade Cnty. v. D.J.W. (In re Mental Commitment of D.J.W.)*, 2020 WI 41, ¶¶ 40–45, 391 Wis. 2d 231, 942 N.W.2d 277. However, neither the examiner nor the court need identify specific future dangerous acts or omissions that the individual might theoretically undertake without treatment. *Winnebago Cnty. v. S.H. (In re Mental Commitment of S.H.)*, 2020 WI App 46, ¶ 13, 393 Wis. 2d 511, 947 N.W.2d 761.

Evidence that an individual has paranoid schizophrenia and a history of going off medications and engaging in dangerous behavior when not committed, coupled with a doctor's testimony that during the individual's commitment her medications were changed and her dangerous paranoid ideations returned, was sufficient to establish dangerousness for recommitment under Wis. Stat. § 51.20(1)(am) and (a)2.c. *S.H.*, 2020 WI App 46, ¶¶ 3, 15, 393 Wis. 2d 511.

Evidence that an individual believed she did not need treatment and previously became acutely psychotic while untreated was insufficient to establish dangerousness under Wis. Stat. § 51.20(1)(am). *Winnebago Cnty. v. L.F.-G. (In re Mental Commitment of L.F.-G.)*, No. 2019AP2010, 2020 WL 2549644 (Wis. Ct. App. May 20, 2020) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

Evidence that, during commitment, an individual complied with treatment and refrained from dangerous behavior but was heard saying he wanted to "snap people's necks" was insufficient to establish dangerousness under Wis. Stat. § 51.20(1)(am) and (a)2.b. *Portage Cnty. v. E.R.R. (In re Mental Commitment of E.R.R.)*, No. 2020AP870-FT, 2020 WL 5823837 (Wis. Ct. App. Oct. 1, 2020) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

Evidence that an individual has schizophrenia, that schizophrenia carries an increased risk of suicide, and that if treatment were withdrawn, the individual will experience more hallucinations, have difficulty maintaining a job, and need to rely on his family for support, was insufficient to establish dangerousness under Wis. Stat. § 51.20(1)(am) and (a)2.c. or d. *D.J.W.*, 2020 WI 41, ¶¶ 53, 57, 391 Wis. 2d 231.

A county's failure to offer evidence of an individual's treatment history and uncontroverted evidence that the individual sought treatment before he was committed, would remain at his group home, and would continue treatment after the commitment's expiration precluded recommitment under Wis. Stat. § 51.20(1)(am) and (a)2.e. *Jackson Cnty. v. W.G. (In re Condition of W.G.)*, No. 2020AP961, 2020 WL 6498568 (Wis. Ct. App. Nov. 5, 2020) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

C. Commencement of a Recommitment Proceeding [§ 2.56]

The commencement of a recommitment requires multiple steps by county actors. First, 21 days before the expiration of an existing commitment, the county to which the individual is committed must (1) file an evaluation of the individual and a recommendation regarding his or her recommitment with the circuit court, and (2) provide a copy to both the individual's counsel and corporation counsel. If the filing date falls on a Saturday, Sunday, or legal holiday, the DHS or the county department must file these documents on the date that most closely precedes the Saturday, Sunday, or legal holiday. Wis. Stat. § 51.20(13)(g)2r.

If corporation counsel agrees with the recommendation, then he or she drafts a petition initiating a recommitment proceeding. Wis. Stat. § 51.20(4)(a).

The Wisconsin Supreme court has held that neither chapter 51 nor due process require a county to allege facts in support of a petition for recommitment. *Waukesha Cnty. v. S.L.L. (In re Mental Commitment of S.L.L.)*, 2019 WI 66, ¶¶ 24, 25, 387 Wis. 2d 333, 929 N.W.2d 140.

Caution. This holding conflicts with the plain language of Wis. Stat. § 51.20(1)(a), (am), and (c), which require a clear and concise statement of facts showing probable cause for a commitment, and Wis. Stat. § 51.20(2)(a), which requires the circuit court to review the petition for probable cause that the individual is eligible for commitment under Wis. Stat. § 51.20(1)(am), the alternate standard of dangerousness for a recommitment. In *S.L.L.*, the court did not consider the connection between Wis. Stat. § 51.20(1)(c) and (2)(a).

The county need not serve the individual with a petition for recommitment. The county may serve the individual's lawyer instead. *S.L.L.*, 2019 WI 66, ¶ 27, 387 Wis. 2d 333 (citing Wis. Stat. § 801.14(2)).

Because a recommitment is a continuation of an initial commitment proceeding, the county need not reestablish personal jurisdiction through compliance with Wis. Stat. § 51.20(2)(b). *S.L.L.*, 2019 WI 66, ¶¶ 27–28, 387 Wis. 2d 333.

An individual who is the subject of a petition for recommitment does not have the right to request substitution if the judge is the same as the judge who presided over the original commitment or a subsequent recommitment. *State ex rel. Serocki v. Circuit Ct. for Clark Cnty.*, 163 Wis. 2d 152, 471 N.W.2d 49 (1991).

D. Examinations [§ 2.57]

At the recommitment stage, counties and circuit courts typically follow the procedures for examinations of the individual set forth in Wis. Stat. § 51.20(9), which requires that examiners to be licensed physicians or psychologists. However, the court of appeals has held that Wis. Stat. § 51.20(9) does not apply at the recommitment stage. Therefore, a nurse practitioner may examine the individual and provide an opinion on whether the individual meets the criteria for a recommitment. *Dodge Cnty. v. L.A.S. (In re Mental Commitment of L.A.S.)*, No. 2017AP302, 2017 WL 3535391 (Wis. Ct. App. Aug. 17, 2017) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

Caution. *L.A.S.* conflicts with *Addington v. Texas*, 441 U.S. 418, 429 (1979), in which the U.S. Supreme Court held that confinement for mental illness and dangerousness requires expert psychiatrists and psychologists to interpret the facts.

E. Procedures [§ 2.58]

Like initial commitments, recommitments are governed by Wis. Stat. § 51.20(10) (hearings), (11) (jury trials), (12) (open hearings exception), and (13) (dispositions). Wis. Stat. § 51.20(13)(g)3.

At a recommitment proceeding, the fact-finder must presume that the individual is not mentally ill, a proper subject for treatment, or dangerous under Wis. Stat. § 51.20(1)(a) and (am). The county bears the burden of proving these elements with clearing and convincing evidence. Wis. Stat. § 51.20(13)(e), (g)3.; *Portage Cnty. v. J.W.K. (In re Mental Commitment of J.W.K.)*, 2019 WI 54, ¶ 18, 386 Wis. 2d 672, 927 N.W.2d 509.

An order recommitting an individual does not automatically extend an existing order for involuntary medication or treatment. The county must again prove, with clear and convincing evidence, that the individual is incompetent to make medication or treatment decisions and is dangerous as defined by Wis. Stat. §§ 51.61(1)(g)1. and 3. and 51.20(13)(e). *Outagamie Cnty. v. Melanie L. (In re Mental Commitment of Melanie L.)*, 2013 WI 67, ¶ 83, 349 Wis. 2d 148, 833 N.W.2d 607.

F. Dispositions [§ 2.59]

Wis. Stat. § 51.20(13), which governs dispositions, applies to both initial commitments and recommitments. *See* Wis. Stat. § 51.20(13)(g)3. However, once a circuit court orders an initial 6-month commitment, additional consecutive recommitment orders cannot exceed 12 months. Wis. Stat. § 51.20(13)(g)1.

If the circuit court recommits the individual, it must make specific factual findings with reference to the standard of dangerousness in Wis. Stat. § 51.20(1)(a)2. on which it is relying. *Langlade Cnty. v. D.J.W. (In re Mental Commitment of D.J.W.)*, 2020 WI 41, ¶¶ 3, 40, 391 Wis. 2d 231, 942 N.W.2d 277. Also, the individual has a due-process right to a written statement by the fact-finder specifying the evidence relied on for the commitment. *Vitek v. Jones*, 445 U.S. 480, 495 (1980).

V. Right to Counsel [§ 2.60]

After the county files a petition for initial commitment or recommitment, the circuit court must ensure that the individual is represented by adversary counsel. The circuit court refers the individual to the State Public Defender, which must appoint legal counsel without first determining the individual's indigency. Wis. Stat. §§ 51.20(3), 51.60.

An individual may decline counsel appointed by the State Public Defender and instead retain private counsel at his or her own expense. Wis. Stat. § 51.60. The individual may also waive the right to counsel and proceed with self-representation. In this situation, the circuit court should conduct a colloquy to determine whether the individual is competent to waive the right to counsel. *S.Y. v. Eau Claire Cnty. (In re Condition of S.Y.)*, 156 Wis. 2d 317, 323–24, 457 N.W.2d 326 (Ct. App. 1990), *aff'd*, 162 Wis. 2d 320, 469 N.W.2d 836 (1991); *see also Pickens v. State*, 96 Wis. 2d 549, 292 N.W.2d 601 (1980), *overruled on other grounds by State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997).

In a commitment proceeding, defense counsel's role is to represent the individual's objectives zealously within the bounds of the law. *See State ex rel. Memmel v. Mundy*, 75 Wis. 2d 276, 284, 249 N.W.2d 573 (1977). Defense counsel does not act as the individual's guardian.

The individual's right to counsel includes the right to the effective assistance of counsel. As with criminal cases, a claim for ineffective assistance of counsel during a commitment proceeding is governed by the standard in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Winnebago Cnty. v. J.M. (In re Mental Commitment of J.M.)*, 2018 WI 37, ¶ 7, 381 Wis. 2d 28, 911 N.W.2d 41.

VI. Discovery [§ 2.61]

Discovery in commitment cases is challenging. The county has time to locate witnesses and evidence before filing its petition. Thereafter, the case proceeds on an accelerated schedule with the final hearing typically occurring within a few weeks. This process allows little time for the individual's attorney to review records, gather evidence, contact potential witnesses, or retain an independent examiner.

The county must provide the individual's attorney access to all psychiatric and other reports 48 hours before the final hearing. Wis. Stat. § 51.20(10)(b). Failure to do so may deprive the circuit court of competence to adjudicate the case. This issue is now pending in the Wisconsin Supreme Court. *See Fond du Lac Cnty. v. S.N.W. (In re Commitment of S.N.W.)*, No. 2019AP2073, 2020 WL 3260732 (Wis. Ct. App. June 17, 2020) (unpublished opinion citable per Wis. Stat. § 809.23(3)(b)) (review dismissed).

Note. This requirement is a codification of the individual's due-process right to an opportunity to prepare a meaningful defense. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1092 (E.D. Wis. 1972).

Counsel for the individual is entitled to access the individual's treatment records and chapter 51 court records without the individual's consent. Wis. Stat. § 51.30(3)(b), (4)(b)11.

"Within a reasonable time prior to the final hearing, each party shall notify all other parties of the witnesses he or she intends to call at the hearing and the substance of their proposed testimony." Wis. Stat. § 51.20(10)(a). The statute does not define "a reasonable time." However, the failure to provide notice of a witness does not bar the presentation of the witness at the final hearing unless doing so will prejudice the opposing party. *Id.*

Also, at a "reasonable time" before the final hearing, the individual or the county may move for the production of all physical evidence that the other intends to introduce into evidence. Wis. Stat. § 51.20(9)(c). The order granting the motion must specify the time, place, manner, terms and conditions for the production of the evidence. If the individual brings the motion, the court may delay the final hearing "for such period as may be necessary for completion of discovery." *Id.*

When the county seeks commitment under Wis. Stat. § 51.20(1)(a)2.e. (the fifth standard of dangerousness), it must provide the court and the individual with an initial recommended written treatment plan describing the goals of treatment, the type of treatment to be provided, the expected treatment providers, and other detailed information before the final hearing. Wis. Stat. § 51.20(10)(cm). Treatment plans for veterans must meet additional special requirements. *See id.* When the county violates this requirement in bad faith, it is grounds for dismissal of the proceeding. *Id.*

VII. Hearings [§ 2.62]

A. Circuit Court Competency to Adjudicate the Case [§ 2.63]

A circuit court's competency refers to its power to exercise subject-matter jurisdiction in a case. *City of Eau Claire v. Booth*, 2016 WI 65, ¶ 7, 370 Wis. 2d 595, 882 N.W.2d 738. In general, noncompliance with statutory mandates may cause the circuit court to lose competency to adjudicate a case. *Id.* ¶ 21.

"In recognition of the significant liberty interest an individual has in living where and under what conditions he or she chooses, the legislature has imposed tight time limits in connection with involuntary detention proceedings." *Dane Cnty. v. Stevenson L.J. (In re Mental Commitment of Stevenson L.J.)*, 2009 WI App 84, ¶ 11, 320 Wis. 2d 194, 768 N.W.2d 223. Thus, if the circuit court violates a time limit for holding a commitment or placement hearing, it must dismiss the case for lack of competency to decide it. *Kindcare, Inc. v. Judith G. (In re Protective Placement, with Guardianship, of Judith G.)*, 2002 WI App 36, ¶ 12, 250 Wis. 2d 817, 640 N.W.2d 839.

Specifically, if the circuit court violates the prescribed time period for holding a probable cause hearing, it loses competency to adjudicate the commitment proceeding and must dismiss it. *Dodge Cnty. v. Ryan E.M. (In re Mental Commitment of Ryan E.M.)*, 2002 WI App 71, ¶ 12, 252 Wis. 2d 490, 642 N.W.2d 592.

If the circuit court fails to hold a final initial commitment hearing within the mandatory time limit in Wis. Stat. § 51.20(7)(c), it must dismiss the petition. *State ex rel. Lockman v. Gerhardstein*, 107 Wis. 2d 325, 328–29, 320 N.W.2d 27 (Ct. App. 1982). The circuit court may reasonably extend the mandatory time limit if the individual's conduct and manipulation has caused the need for an extension. *County of Milwaukee v. Edward S. (In re Mental Commitment of Edward S.)*, 2001 WI App 169, ¶ 9, 247 Wis. 2d 87, 633 N.W.2d 241.

If the circuit court fails to hold a recommitment hearing before the existing commitment expires, it loses competency to adjudicate the petition and must dismiss it. *G.O.T. v. Rock Cnty. (In re Mental Condition of G.O.T.)*, 151 Wis. 2d 629, 631, 445 N.W.2d 697 (Ct. App. 1989).

Note. Some commitment cases incorrectly use the terms "competency" and "jurisdiction" as synonyms. *See, e.g.*, *Lockman*, 107 Wis. 2d at 328–29. The Wisconsin Supreme Court explained the correct meaning of these terms in *Booth*, 2016 WI 65, ¶ 7, 370 Wis. 2d 595.

B. Burden of Proof [§ 2.64]

The county must prove all facts necessary to support a commitment or a recommitment by clear and convincing evidence. Wis. Stat. § 51.20(13)(e), (g)3.; *Addington v. Texas*, 441 U.S. 418, 431–32 (1979).

C. The Individual's Procedural Rights [§ 2.65]

All chapter 51 hearings must conform to the essentials of due process of law and fair treatment. Accordingly, Wis. Stat. § 51.20(5) provides that at a chapter 51 hearing, the individual has the following rights:

- The individual has the right to counsel.
- The individual has the right to appear at the hearing in person and to present and cross-examine witnesses. *See also* Wis. Stat. § 885.60(1), (2)(a) (statutory right to be physically present).
- The individual has a right to remain silent.
- The individual has the right to an open hearing and the right to request a closed hearing. The hearing will be open unless the individual, or counsel with the individual's approval, requests a closed hearing. Wis. Stat. § 51.20(12). The circuit court must hold a public hearing on the issue of closure. *State ex rel. Wis. State J. v. Circuit Ct. for Dane Cnty.*, 131 Wis. 2d 515, 389 N.W.2d 73 (Ct. App. 1986).
- The individual has the right to a jury trial if requested under Wis. Stat. § 51.20(11).

Note. In *Vitek v. Jones*, 445 U.S. 480, 494–95 (1980), the U.S. Supreme Court established that the individual, even if he or she is a prisoner, has minimum 14th Amendment due-process rights at a commitment hearing. Although chapter 51 does not list all of these rights, *Vitek* is binding on Wisconsin courts. Under *Vitek*,

- The individual has a right to effective and timely notice of his or her due-process rights.
- The individual has the right to written notice of the commitment proceeding.
- The individual has the right to a hearing, sufficiently after the notice, to permit the individual to prepare a defense.
- The individual has the right to know the county's evidence, to be heard in person, to present documentary evidence, to present testimony, and to confront and cross-examine the county's witnesses.
- The individual has the right to an independent decision-maker.
- The individual has a right to a written statement by the fact-finder of the evidence relied on for the commitment.

D. Location of Hearing and Remote Testimony [§ 2.66]

The circuit court may hold a hearing at the facility where the individual is detained, unless the individual or defense counsel objects. Wis. Stat. § 51.20(10)(b).

If the individual is detained at a facility more than 100 miles from the courthouse, and if the facility has videoconferencing capabilities that meet the technical and operational standards of Wis. Stat. § 885.54, the circuit court may conduct a hearing by videoconferencing, unless both the individual and the county object. Wis. Stat. § 51.20(5)(c). When determining whether or how to permit the use of videoconferencing technology, the circuit court considers the criteria listed in Wis. Stat. § 885.56.

Note. Wis. Stat. § 885.60(2)(d) provides that if the respondent in a chapter 51 proceeding objects to testimony via videoconferencing for a hearing where he or she is entitled to be physically present in the courtroom, "the court shall sustain the objection."

Witnesses may testify by telephone. Wis. Stat. § 807.13(2). Allowing examiners to testify by telephone does not violate the individual's right to confront witnesses. *W.J.C. v. County of Vilas (In re W.J.C.)*, 124 Wis. 2d 238, 242, 369 N.W.2d 162 (Ct. App. 1985).

Caution. *W.J.C.* holds that because a commitment proceeding is civil rather than criminal, the individual has no federal or state constitutional right to confront witnesses. *Id.* at 240. This holding conflicts with *Vitek v. Jones*, 445 U.S. 480, 494–95 (1980) (noting that an individual undergoing commitment has a 14th Amendment right to confront and cross-examine witnesses).

E. Jury Trials [§ 2.67]

An individual has a statutory right to a jury trial for a final commitment or recommitment hearing as provided in Wis. Stat. § 51.20(11)(a). *See G.O.T. v. Rock Cnty. (In re Mental Condition of G.O.T.)*, 151 Wis. 2d 629, 634–35, 445 N.W.2d 697 (Ct. App. 1989) (holding that right to a jury also applies to recommitment hearings). Defense counsel may also demand a jury trial, if the individual does not object. Wis. Stat. § 51.20(11)(a).

If the individual or defense counsel has been provided notice of the final hearing, the jury trial demand must be made "at least 48 hours in advance of the time set for final hearing." *Id.* If the time set for the final hearing has been postponed, the individual has no right to demand a jury trial 48 hours before the rescheduled hearing. *Marathon Cnty. v. R.J.O. (In re Mental Commitment of R.J.O.)*, 2020 WI App 20, ¶ 41, 392 Wis. 2d 157, 943 N.W.2d 898.

Caution. The Wisconsin Supreme Court has granted review on the question of whether an adjournment of a final commitment hearing for good cause resets the 48-hour deadline for demanding a jury trial. *Waukesha Cnty v. E.J.W. (In re Mental Commitment of E.J.W.)*, No. 2020AP370, 2020 WL 6479204 (Wis. Ct. App. Nov. 4, 2020) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (review granted).

If the individual or defense counsel demands a jury trial within 5 days after detention, the jury trial shall be held within 14 days after detention. If the individual or defense counsel files a jury-trial demand after the 5th day, the final hearing shall be held within 14 days after the jury-trial demand. Wis. Stat. § 51.20(11)(a). A court may extend a commitment to accommodate a jury-trial demand as long as the final hearing is held within 14 days after the demand. *G.O.T.*, 151 Wis. 2d at 634.

Once the individual or defense counsel requests a jury trial, counsel may not withdraw the request without first consulting the individual. *S.B. v. Racine Cnty. (In re S.B.)*, 138 Wis. 2d 409, 413–14, 406 N.W.2d 408 (1987).

If there has been a proper jury demand, the court must direct a jury of six people to determine whether the individual should be committed or recommitted. Wis. Stat. § 51.20(11)(a). Five members of the jury must agree to the verdict.

Note. The legislature's decision to provide for a non-unanimous 6-person jury under chapter 51, rather than a 12-person jury as in chapter 980, does not violate equal protection of the laws. *Milwaukee Cnty. v. Mary F.-R. (In re Mental Commitment of Mary F.-R.)*, 2013 WI 92, ¶ 40, 351 Wis. 2d 273, 839 N.W.2d 581.

F. Evidence [§ 2.68]

1. In General [§ 2.69]

Unless otherwise provided, the rules of evidence apply to any judicial proceeding or hearing under chapter 51. Wis. Stat. § 51.20(10)(c).

2. The Individual's Statement to the Examiner [§ 2.70]

An examiner must inform the individual of his or her right to remain silent before examination. The issuance of this warning establishes a presumption that the individual understands that he or she need not speak to an examiner. Wis. Stat. § 51.20(9)(a)4.

If, after receiving this warning, the individual makes a statement, it is admissible against him or her at a hearing. Wis. Stat. § 908.01(4)(b).

If the individual declines to make a statement, the examiner may engage in an independent review of available records and information provided by others in forming his or her opinion. However, the records and the information that the examiner relies on are subject to the rule against hearsay, *see infra* § 2.72.

3. The Individual's Medical Records [§ 2.71]

Although medical records are generally subject to the physician-patient privilege, there is no privilege as to communications and information relevant to an issue at a probable cause hearing or a final commitment hearing under chapter 51. Wis. Stat. § 905.04(2), (4)(a).

4. Hearsay [§ 2.72]

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Wis. Stat. § 908.01(3). Because the rules of evidence apply to chapter 51 proceedings, so does the hearsay rule. Wis. Stat. §§ 51.20(10)(c), 908.02, 908.03. The hearsay rule protects the individual's statutory and due-process right to confront and cross-examine witnesses. Wis. Stat. § 51.20(5); *Vitek v. Jones*, 445 U.S. 480, 494 (1980).

An examiner's report is hearsay and cannot be admitted into evidence without testimony by the examiner and cross-examination by the defense. *R.S. v. Milwaukee Cnty. (In re Guardianship of R.S.)*, 162 Wis. 2d 197, 205, 209–10, 470 N.W.2d 260 (1991).

Although an examiner may rely on hearsay evidence of dangerousness to form his or her opinion, the hearsay itself is inadmissible. The proponent of it must establish its truth with admissible evidence; otherwise the fact-finder cannot rely on it. *S.Y. v. Eau Claire Cnty. (In re Condition of S.Y.)*, 156 Wis. 2d 317, 327–28, 457 N.W.2d 326 (Ct. App. 1990), *aff'd*, 162 Wis. 2d 320, 469 N.W.2d 836 (1991).

An examiner may not be a conduit for the hearsay opinion of another expert. *Walworth Cnty. v. Therese B. (In re Guardianship of Therese B.)*, 2003 WI App 223, ¶ 9, 267 Wis. 2d 310, 671 N.W.2d 377.

Hospital records are admissible. Wis. Stat. § 908.03(6m). However, entries within the records may be inadmissible hearsay.

G. Rules of Civil Procedure [§ 2.73]

Except as otherwise provided in chapter 51, Wis. Stat. § 801.01(2), which incorporates the rules of civil procedure, applies to any judicial proceeding or hearing held under chapter 51.

H. Defects in Proceedings [§ 2.74]

Wis. Stat. § 51.20(10)(c) provides that the court "shall" at every stage ignore defects in pleadings and proceedings that do not affect the substantial rights of either party. The individual's right to due process is a substantial right that merits consideration whenever this provision is invoked.

VIII. Treatment and Medication [§ 2.75]

A. In General [§ 2.76]

Chapter 51 includes a section on "patient's rights." A *patient* is defined as any individual who is receiving services for mental illness, developmental disabilities, alcoholism, or drug dependency. Wis. Stat. § 51.61(1).

Upon commitment or admission to a treatment facility, the individual must be informed orally and in writing of his or her rights. Wis. Stat. § 51.61(1)(a). These rights include the right to receive treatment and medication and the right to refuse treatment and medication. Wis. Stat. § 51.61(1)(f), (g)1. Copies of these rights must also be posted in each patient area and be made available to patients' guardians and immediate family members. Wis. Stat. § 51.61(1)(a).

B. Right to Treatment and Medication [§ 2.77]

An individual has the right to receive prompt and adequate treatment and rehabilitation and education services appropriate for his or her condition. Wis. Stat. § 51.61(1)(f). These rights are, however, limited to what the county is "reasonably able to provide" within available funding. *Id.*

An individual also has the right to be informed of treatment and care and to participate in his or her treatment plan. Wis. Stat. § 51.61(1)(fm); Wis. Admin. Code § DHS 94.03.

C. Right to Refuse Treatment and Medication [§ 2.78]

1. Right to Refuse [§ 2.79]

"The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." *Washington v. Harper*, 494 U.S. 210, 229 (1990). So does mandatory behavior modification as a form of treatment for mental illness. *Vitek v. Jones*, 445 U.S. 480, 494 (1980).

An individual has the right to refuse unwanted medication or treatment under common law, the 14th Amendment (U.S. Const. amend. XIV), and Wis. Const. art. I, § I. *Outagamie Cnty. v. Melanie L. (In re Mental Commitment of Melanie L.)*, 2013 WI 67, ¶ 42, 349 Wis. 2d 148, 833 N.W.2d 607; *see also Washington v. Harper*, 494 U.S. 210, 221–22 (1990); *Lenz v. L.E. Phillips Career Dev. Ctr. (In re Guardianship of L.W.)*, 167 Wis. 2d 53, 73–74, 482 N.W.2d 60 (1992).

An individual does not lose the right to refuse simply because he or she is mentally ill. Wis. Stat. § 51.59(1); *State ex rel. Jones v. Gerhardstein*, 141 Wis. 2d 710, 728, 416 N.W.2d 883 (1987) (stating that "[a]n individual may be psychotic, yet nevertheless capable of evaluating the advantages and disadvantages of taking psychotropic drugs and making an informed decision").

Nor does the individual lose the right to refuse medication or treatment simply because he or she is incompetent to make medication or treatment decisions. *Winnebago Cnty. v. C.S. (In re Mental Commitment of C.S.)*, 2020 WI 33, ¶¶ 31–33, 391 Wis. 2d 35, 940 N.W.2d 875.

2. No Right to Refuse [§ 2.80]

An individual may not refuse medication or treatment in the following circumstances:

- Treatment or medication is necessary to prevent serious physical harm to the individual or others. Wis. Stat. § 51.61(1)(g)1.
- An individual has been committed under the fifth standard (discussed in section 2.15, *supra*). Wis. Stat. § 51.20(1)(a)2.e.
- After a hearing to determine probable cause for a commitment but before a final hearing, a court finds probable cause that (1) an individual is not competent to refuse, (2) medication or treatment will have therapeutic value, and (3) medication or treatment will not unreasonably impair the subject's ability to participate in a later legal proceeding. Wis. Stat. § 51.61(1)(g)2.
- After a final commitment order, a court finds that (1) an individual is not competent to refuse, or (2) a situation exists in which medication or treatment is necessary to prevent serious physical harm to the individual or others. Wis. Stat. § 51.61(1)(g)3.

Caution. The Wisconsin Supreme Court recently stressed that an individual may refuse medication or treatment even if he or she is incompetent to make medication or treatment decisions. For involuntary medication or treatment, the individual must be dangerous. *Winnebago Cnty. v. C.S. (In re Mental Commitment of C.S.)*, 2020 WI 33, ¶¶ 31–33, 391 Wis. 2d 35, 940 N.W.2d 875. This holding calls parts of Wis. Stat. § 51.61(1)(g)2. and 3. into doubt.

3. Not Competent to Refuse [§ 2.81]

An individual is presumed competent to decide whether to refuse medication and treatment. *Virgil D. v. Rock Cnty. (In re Mental Condition of Virgil D.)*, 189 Wis. 2d 1, 14, 524 N.W.2d 894 (1994). The individual's decision to refuse medication or treatment does not prove that he or she is incompetent to make an informed decision on the matter. *Id.* at 15–16.

The county must prove that an individual is incompetent to refuse medication or treatment by clear and convincing evidence. *Outagamie Cnty. v. Melanie L. (In re Mental Commitment of Melanie L.)*, 2013 WI 67, ¶ 37, 349 Wis. 2d 148, 833 N.W.2d 607.

To meet this standard, a county must show that the individual received a timely and reasonable explanation of proposed medication, including "why a particular drug is being prescribed, what the advantages of the drug are expected to be, what side effects may be anticipated or are possible, and whether there are reasonable alternatives to the prescribed medication." *Id.* ¶ 67.

Note. A failure to provide the statutorily required explanation of medications is grounds for reversal of an involuntary medication order. *See Waukesha Cnty. v. Kathleen H. (In re Mental Commitment of Kathleen H.)*, No. 2014AP90, 2014 WL 2871274 (Wis. Ct. App. June 25, 2014) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)).

The county must also show that after receiving an explanation of the advantages and disadvantages of, and alternatives to, accepting psychotropic medication, the individual is either

- Incapable of expressing an understanding of the advantages and disadvantages of accepting medication and treatment and the alternatives, or
- Incapable of applying an understanding of the advantages and disadvantages of and alternatives to his or her mental illness in order to make an informed choice as to whether to accept or refuse psychotropic medication.

Wis. Stat. § 51.61(1)(g)1.–2. For a detailed discussion of the second requirement, see *Melanie L.*, 2013 WI 67, ¶¶ 67–78, 349 Wis. 2d 148.

When determining whether an individual understands the advantages, disadvantages, and alternatives to a particular medication, a circuit court should take into account the following factors:

- Whether the individual is able to identify the type of recommended medication or treatment;
- Whether the individual has previously received the type of medication or treatment at issue;
  - If so, then whether the individual can describe what happened as a result and how the effects were beneficial or harmful.
  - If not, then whether the individual can identify the risks and benefits associated with the recommended medication or treatment; and
- Whether the patient holds any patently false beliefs about the recommended medication or treatment that would prevent an understanding of legitimate risks and benefits.

Id. ¶ 50. An individual's history of noncompliance in taking medication is relevant, but it is not determinative if the individual can reasonably explain the reason for the noncompliance. *Id.* ¶ 75.

IX. Commitment and Treatment of Inmates [§ 2.82]

A. In General [§ 2.83]

The requirements and rights in Wis. Stat. §§ 51.20 and 51.61 also apply to the commitment of inmates. However, additional provisions apply exclusively to inmates. This section highlights the inmate provisions.

B. Initiation of Commitment [§ 2.84]

A conviction permits the state to confine an individual, but it does not entitle the state to declare that the individual is mentally ill and subject him or her to involuntary care in a mental hospital. *Vitek v. Jones*, 445 U.S. 480, 493 (1980). Even inmates have a "powerful" liberty interest in "not being arbitrarily classified as mentally ill and subjected to unwelcome treatment…." *Id.* at 495.

There are two ways a county may seek the commitment of an inmate. It may proceed under Wis. Stat. § 51.20(1), which requires it to find the inmate dangerous under Wis. Stat. § 51.20(1)(a)2.a.–e. Or it may proceed under Wis. Stat. § 51.20(1)(ar), which does not require a finding of dangerousness. *Winnebago Cnty. v. Christopher S. (In re Mental Commitment of Christopher S.)*, 2016 WI 1, 366 Wis. 2d 1, 878 N.W.2d 109.

To commit an inmate under Wis. Stat. § 51.20(1)(ar), the county's petition may allege that the inmate

- Is mentally ill,
- Is a proper subject for treatment, and
- Is in need of treatment.

However, Wis. Stat. § 51.20(1)(ar) further provides that the county's petition must

- Allege that appropriate less restrictive forms of treatment were attempted with the inmate and were unsuccessful;
- Describe the less restrictive forms of treatment that were attempted;
- Allege that the inmate has been fully informed about his or her treatment needs, the mental health services available to him or her, and his or her rights under chapter 51 and that the inmate has had an opportunity to discuss all of these matters with a licensed physician or a licensed psychologist (*see also* Wis. Stat. § 51.20(19)); and

- Allege the inmate's sentence and his or her expected date of release.

In addition, the county must attach to the petition "a signed statement by a licensed physician or a licensed psychologist of a state prison and a signed statement by a licensed physician or a licensed psychologist of a state treatment facility" attesting to either of the following:

- The inmate needs inpatient treatment at a state treatment facility because appropriate treatment is not available in the prison, or
- The inmate's treatment needs can be met on an outpatient basis in the prison.

Wis. Stat. § 51.20(1)(ar).

C. Probable Cause Hearings [§ 2.85]

For an inmate of a state prison, county jail, or house of correction, the court must hold a hearing "within a reasonable time" after the filing of the petition to determine whether there is probable cause for its allegations. Wis. Stat. § 51.20(7)(b).

D. Jury Demands [§ 2.86]

If an inmate of a state prison, county jail, or house of correction demands a jury trial within 5 days after the probable cause hearing, the final hearing shall be held within 28 days after the probable cause hearing. Wis. Stat. § 51.20(11)(a). If the inmate demands a jury trial later than 5 days after the probable cause hearing, the final hearing shall be held within 28 days after the date of demand. *Id.*

E. Dispositions [§ 2.87]

An inmate in a state prison is treated differently than an inmate in a county jail or house of correction.

If the individual is an inmate of a state prison and the county proves the elements of Wis. Stat. § 51.20(1)(a) or (ar), the circuit court will order the inmate committed to the DHS and authorize the inmate's transfer to a state treatment facility or, if inpatient care is not needed, treatment on an outpatient basis in the prison. Wis. Stat. § 51.20(13)(a)4.

If the individual is an inmate of a county jail or house of correction and the county proves the elements of Wis. Stat. § 51.20(1)(a), the court will order the inmate committed to the county department under Wis. Stat. § 51.42 or 51.437 that serves the inmate's county of residence or, if the inmate is a nonresident, order commitment to the DHS. Wis. Stat. § 51.20(13)(a)4m. The order must either authorize the inmate's transfer to a state or county treatment facility or, if inpatient care is not needed, treatment on an outpatient basis in the jail or house of corrections. *Id.*

Wis. Stat. § 51.20(13)(cm) provides additional rules for when the commitment involves the transfer of an inmate to a treatment facility.

F. Treatment and Medication [§ 2.88]

Although a finding of dangerousness is not necessary for involuntary commitment an inmate, it is necessary for involuntary medication. *Winnebago Cnty. v. C.S. (In re Mental Commitment of C.S.)*, 2020 WI 33, ¶¶ 17, 34, 391 Wis. 2d 35, 940 N.W.2d 875; *see also Washington v. Harper*, 494 U.S. 210, 227 (1990).

X. Consequences of Involuntary Commitment, Treatment, and Medication [§ 2.89]

The goal of an involuntary commitment is to provide rehabilitative treatment or care to an individual so that he or she may return to society. Wis. Stat. § 51.001(1); *Fond du Lac Cnty. v. Helen E.F. (In re Mental Commitment of Helen E.F.)*, 2012 WI 50, ¶ 25, 340 Wis. 2d 500, 814 N.W.2d 179.

However, a commitment deprives an individual of fundamental personal liberties. For example, a commitment denies the individual's right to choose where, with whom, and how to live. *O'Connor v. Donaldson*, 422 U.S. 563, 575–76 (1975).

A commitment might require the individual to take unwanted antipsychotic medication that can have uncomfortable and even fatal side effects. *Outagamie Cnty. v. Melanie L. (In re Mental Commitment of Melanie L.)*, 2013 WI 67, ¶ 43 n.17, 349 Wis. 2d 148, 833 N.W.2d 607. It might also subject the individual to mandatory behavior modification as a form of treatment. *Vitek v. Jones*, 445 U.S. 480, 494 (1980).

A commitment is stigmatizing and may cause adverse social consequences for the individual. *Addington v. Texas*, 441 U.S. 418, 425–26 (1979). Although Wis. Stat. § 51.30 aims to shield the individual's right to privacy, it authorizes the release of commitment and treatment records without the individual's consent in many situations. Also, the individual's immediate family and friends will likely know of the commitment.

An adjudication that an individual is "mentally defective" or a commitment to a mental institution automatically results in a loss of the right to possess a firearm under state and federal law. *See Marathon Cnty. v. D.K. (In re Condition of D.K.)*, 2020 WI 8, ¶ 25, 390 Wis. 2d 50, 937 N.W.2d 901; *see also* 18 U.S.C. § 921(a)(3); 18 U.S.C. § 922(g)(4); Wis. Stat. § 51.20(13)(cv).

An emergency detention or a commitment may have financial consequences for an individual, including liability for the costs of institutionalization and care under Wis. Stat. § 46.10(2) and (3). *But see Jankowski v. Milwaukee Cnty.*, 104 Wis. 2d 431, 312 N.W.2d 45 (1981) (holding that persons illegally detained or committed under chapter 51 cannot be charged with costs); *Ethelyn I.C. v. Waukesha Cnty. (In re Guardianship of Ethelyn I.C.)*, 221 Wis. 2d 109, 120–21, 584 N.W.2d 211 (Ct. App. 1998) (holding that persons illegally detained or placed under chapter 55 cannot be charged with costs).

In general, a commitment is not an adjudication that the individual is incompetent to exercise civil rights, to manage his or her affairs, to contract, to hold a professional or occupational license, to marry, to divorce, or to make a will. Wis. Stat. § 51.59(1).

On the other hand, individuals employed in certain professions are required to disclose that they have been adjudicated as "mentally defective" or committed to a mental institution. *See, e.g.*, Wis. Stat. § 343.14(2g)(a)3. (persons holding operator's license with an H endorsement for transporting hazardous materials).

Also, physicians, physician assistants, and advanced practice nurse prescribers who treat an individual with a mental condition that might affect the individual's ability to exercise reasonable and ordinary control over a vehicle must report the individual's name and condition to the Wisconsin Department of Transportation. Wis. Stat. § 146.82(3)(a). The individual's consent is not required for release of this information.

XI. Appeals [§ 2.90]

A. Procedure [§ 2.91]

The individual, his or her guardian, and the county have a statutory right to appeal a final chapter 51 order. The appellant must file the appeal within the time specified in Wis. Stat. § 808.04(3) and in accordance with Wis. Stat. § 809.30. Wis. Stat. § 51.20(15).

Wis. Stat. § 809.30(2) prescribes the procedure for filing a postdisposition motion and appeal. It explains the filing of a notice of intent to pursue postdisposition relief, the appointment of appellate counsel for the individual, the preparation and filing of transcripts and the circuit court record, and related procedures. *See also* Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* ch. 19 (State Bar of Wis. 8th ed. 2020 & Supp.).

Note. Appointed counsel will also find guidance on these rules in *Appellate Practice and Procedure for SPD-Appointed Counsel* (4th ed. 2020), which is available at http://www.wispd.gov/appellate-division.

As in criminal cases, it is trial counsel's obligation to file the notice of intent to pursue postdisposition relief in a chapter 51 case. Wis. Stat. § 809.30(2)(a). Final commitment hearings may conclude with two potential circuit court orders: (1) an order for commitment or recommitment, and (2) an order for involuntary medication or treatment. The notice of intent should list both orders so as not to hamper appellate counsel's consideration of potential issues for review.

The appellant must first file a motion for postdisposition relief in the circuit court, unless the grounds for seeking relief have been previously raised or are a challenge to the sufficiency of evidence to support the orders. Wis. Stat. § 809.30(2)(h); *see also Portage Cnty. v. L.E. (In re Mental Commitment of L.E.)*, No. 2019AP1841-FT, 2020 WL 97733, ¶¶ 14–15 (Wis. Ct. App. Jan. 9, 2020) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)). As in criminal cases, a claim for ineffective assistance of counsel must be litigated in the circuit court before appeal.

An appellant must initiate an appeal under Wis. Stat. § 809.10. Accordingly, the appellant must file a docketing statement when he or she files a notice of appeal. Wis. Stat. § 809.10(1)(d).

The files and records of chapter 51 proceedings are closed. Wis. Stat. § 51.30(3)(a). Therefore, appellate briefs must refer to the individual by the individual's initials or an appropriate pseudonym or designation rather than by the individual's full name. Wis. Stat. § 809.19(1)(g). In addition, appendix documents referring to the individual's name must be redacted and reproduced in the same manner. Wis. Stat. § 809.19(2)(a), (b).

Chapter 51 appeals are decided by one judge rather than a panel of three judges. Opinions written by one appellate judge are not eligible for publication. Lawyers may cite these opinions as persuasive authority, but they are not binding precedent. Wis. Stat. § 809.23(3)(b).

If a chapter 51 appeal presents an issue worthy of publication under Wis. Stat. § 809.23(1)(a), the appellant may file a motion for a three-judge panel, when he or she files a notice of appeal. Wis. Stat. § 809.41(1). If the appellant does not move for a three-judge panel, the single judge assigned to the appeal may ask the chief judge to convert the appeal to a three-judge panel. Wis. Stat. § 809.41(1). If the motion is granted, the panel may issue a published opinion establishing binding precedent.

B. Problems [§ 2.92]

1. The Mootness Doctrine [§ 2.93]

The short length of an order for commitment, recommitment, and involuntary medication or treatment creates a problem for appellate lawyers whether they represent the individual or the county. The orders often expire before the court of appeals can issue a decision addressing the merits of the appeal. Wisconsin appellate courts generally regard appeals from expired commitment orders as moot. *Marathon Cnty. v. D.K. (In re Condition of D.K.)*, 2020 WI 8, ¶ 22, 390 Wis. 2d 50, 937 N.W.2d 901.

"An issue is moot when its resolution will have no practical effect on the underlying controversy." *Id.* ¶ 19 (citation omitted). An appeal from an expired commitment order may present a live controversy when the order has collateral consequences for the appellant. For example, if the commitment causes the individual to lose his or her right to possess a firearm, the appeal is not moot because reversal of the commitment order would void the firearm ban. *Id.* ¶ 25. Commitments carry many additional direct and collateral consequences for the individual. *See supra* § 2.89.

Note. The issue of whether appellate courts should ever dismiss as moot appeals from expired commitment orders as moot is pending before the Wisconsin Supreme Court in *Sauk County v. S.A.M. (In re Mental Commitment of S.A.M.)*, No. 2019AP1033, 2020 WL 5240605 (Wis. Ct. App. Sept. 3, 2020) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (review granted).

In the absence of a live controversy, an appellate court may choose to decide the merits of an appeal from an expired commitment when one of the exceptions to the mootness doctrine applies. Those exceptions are the following:

- The issue is of great public importance,
- The issue involves the constitutionality of a statute,
- The issue arises often and a decision from the appellate court is essential,
- The issue is likely to recur and must be resolved to avoid uncertainty, or
- The issue is likely to recur and evade appellate review.

D.K., 2020 WI 8, ¶ 19, 390 Wis. 2d 50.

Appellate lawyers should carefully consider the mootness doctrine before filing a postdisposition motion, docketing statement, or appellate brief in a chapter 51 appeal.

Practice Tip. Here are some practical suggestions for avoiding dismissal based on mootness.

- To the extent possible, frame issues for review so that they arguably fall within an exception to the mootness doctrine.
- Be aware that pursuing a postdisposition motion in the circuit court—such as a claim for ineffective assistance of counsel—will consume significant time for briefing and a hearing, increasing the odds that the underlying commitment will expire before the court of appeals can address the issue.
- Consider asking the court of appeals to place a commitment appeal on the fast-track calendar. This program is available in Districts 2, 3, and 4 of the Wisconsin Court of Appeals, but not District 1. The fast track is not suitable for appeals raising more than three

issues or issues worthy of publication. For more on the fast-track calendar see Heffernan, *Appellate Practice and Procedure in Wisconsin*, *supra* § 2.91, ch. 15.

- Explore filing a motion to advance the case in the court of appeals pursuant to Wis. Stat. § 809.20. A motion to advance is appropriate in situations in which a delay may be "prejudicial to the accomplishment of justice." *Id.*

2. Remand Proceedings [§ 2.94]

By the time an appellate court reverses a commitment or treatment order and remands the case for further proceedings, the deadline for holding the final hearing will have lapsed. Thus, the circuit court will lack competency to adjudicate the petition. *See supra* § 2.63.

Likewise, by the time an appellate court orders remand proceedings, the county's evidence that the individual is both mentally ill and dangerous will be stale. *See Portage Cnty. v. J.W.K. (In re Mental Commitment of J.W.K.)*, 2019 WI 54, ¶ 16, 386 Wis. 2d 672, 927 N.W.2d 509 (holding that commitment must be based on finding of current, not retrospective, mental illness and dangerousness).

XII. Confidentiality and Release of the Individual's Records [§ 2.95]

A. In General [§ 2.96]

Chapter 51 proceedings require scrutiny of deeply personal information about an individual's mental health, emotional well-being, and behavior. The legislature, through Wis. Stat. § 51.30, protects the privacy of these matters to shield the individual from stigma and facilitate his or her reintegration into society after a commitment. *Billy Jo W. v. Metro (In re Mental Condition of Billy Jo W.)*, 182 Wis. 2d 616, 632, 514 N.W.2d 707 (1994).

B. Court Records [§ 2.97]

Wis. Stat. § 51.30(3)(a) provides that records and files from chapter 51 proceedings are closed unless a statutory exception applies.

The individual is entitled to see his or her court files and records. Wis. Stat. § 51.30(3)(a).

The individual's counsel, his or her guardian ad litem, and the county may access chapter 51 court files and records to prepare for commitment or recommitment proceedings, appeals, or other actions under chapters 51, 971, 975, and 980. They need not obtain the individual's informed consent first. Wis. Stat. § 51.30(3)(b).

A court may order the release of chapter 51 records and files with the individual's informed written consent. Wis. Stats. § 51.30(3).

The Department of Corrections, the DHS, the Department of Justice, and prosecutors may access chapter 51 court files and records without the individual's informed consent for purposes specified in Wis. Stat. § 51.30(3)(bm) and (d).

C. Registration and Treatment Records [§ 2.98]

Registration records are records created by the DHS, county departments, and treatment facilities while providing services to individuals under chapter 51. Wis. Stat. § 51.30(1)(am). Treatment records refer to "registration records" and all other records created in the course of providing services to individuals under chapter 51. These include records kept by mental health professionals who are not affiliated with a county department or a treatment facility. Wis. Stat. § 51.30(1)(b).

Wis. Stat. § 51.30(4)(a) provides the general rule that all treatment records are confidential and privileged to the subject individual unless a statutory exception applies or unless the individual gives informed written consent. It then lists dozens of exceptions for situations when these records may be released without the individual's consent.

The individual's counsel, his or her guardian ad litem, and the county may access registration and treatment records, without modification, to prepare for commitment or recommitment proceedings, appeals, or other actions under chapters 51, 971, 975, and 980. They need not obtain the individual's informed consent first. Wis. Stat. § 51.30(4)(b)11.

Registration and treatment records may be released pursuant to a lawful order of a court of record. Wis. Stat. § 51.30(4)(b)4.

Additional statutes address the confidentiality and release of an individual's treatment records, but they are beyond the scope of this chapter. *See, e.g.*, Wis. Stat. §§ 118.125(4), 610.70(3), 905.03, 905.04.

Wisconsin's patients' rights statute provides that an individual receiving services under chapter 51 has the right to confidentiality of all treatment records. Wis. Stat. § 51.61(1)(n). The individual may challenge a violation of this right by filing a grievance under Wis. Stat. § 51.30(8) or an action for compensatory and exemplary damages under Wis. Stat. § 51.30(9). The disclosure of confidential information may result in fines, penalties, discipline, or even imprisonment. Wis. Stat. § 51.30(8), (9), (10), (11).

XIII. Conclusion [§ 2.99]

This is a summary of chapter 51's provisions pertaining to involuntary civil commitments, treatment, and medication as well as current federal and state case law governing these proceedings. It is designed to help judges and lawyers working on these issues balance the individuals' needs for health and safety with their fundamental rights, in order to promote fair and reliable outcomes. Wisconsin case law on these matters is rapidly evolving. At the time of publication, several appeals testing commonly used provisions of chapter 51 are pending in Wisconsin's appellate courts. It is therefore especially important to check the current state of the law when working in this field.

Chapter 3
Chapter 980 Commitments

Andrew Hinkel
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I. Introduction [§ 3.1]

Since 1994, a person approaching the end of confinement in Wisconsin for a conviction or adjudication of certain sexual offenses is not necessarily released. Instead, the state (represented by either the Wisconsin Department of Justice (DOJ) or a district attorney) may seek to have the person indefinitely committed under Wis. Stat. ch. 980.[2]

This chapter gives an overview of that statute and the law that has developed around it. For a brief account of the origins and evolution of sex offender commitments in Wisconsin, see sections 3.2–.8, *infra*. (Even attorneys uninterested in history may find something of value in sections 3.4–.8, *infra*, which lay out the major revisions to the statute over the decades; these frequent alterations mean that older cases often cannot be relied on to accurately state the law.)

Sections 3.9–.16, *infra*, address the basic question that underlies most litigation under Wis. Stat. ch. 980: who is, and is not, a "sexually violent person" and thus subject to commitment. To be considered a sexually violent person, a person must meet three criteria: he or she must have committed a qualifying offense (known as a *sexually violent offense*); he or she must have a mental disorder; and that mental disorder must render the person "dangerous"—that is, more likely than not to commit a certain class of sexual offenses in the future. Each of these three questions has generated its own body of law, addressed in detail in sections 3.9–.16, *infra*.

The next two parts outline the procedures that may culminate in commitment. Sections 3.17–.22, *infra*, cover the administrative winnowing process that precedes the filing of a petition, and sections 3.23–.30, *infra*, describe the pretrial litigation, the trial itself, and the annual reviews of a person who is committed.

A Wis. Stat. ch. 980 commitment results in the person's confinement at Sand Ridge Secure Treatment Facility [hereinafter Sand Ridge] in Mauston, Wisconsin, which is administered by the Wisconsin Department of Health Services (DHS). Commitments to Sand Ridge are indefinite; barring further proceedings a committed person will die in the institution. Section 3.31, *infra*, describes one means by which a person can seek to leave Sand Ridge: a petition to the committing court for supervised release. Such a petitioner must show he or she has made adequate process in treatment and meets other criteria; if the petition is successful the person lives in the community under restrictions and monitored by the DHS.

Sections 3.32–.37, *infra*, concern the other path out of Sand Ridge: petitions for discharge, by which the committed person seeks to end the commitment altogether because he or she no longer satisfies the criteria for commitment.

Sections 3.38–.47, *infra*, briefly summarize the constitutional and quasi-constitutional rights afforded the subject of a Wis. Stat. ch. 980 petition and identify a few important cases addressing the scope of these rights.

Sections 3.48–.51, *infra*, cover postcommitment proceedings and appeals. Finally, section 3.52, *infra*, briefly addresses some of the Wis. Stat. ch. 980-related considerations a criminal defense attorney must bear in mind when defending sex cases.

II. Evolution of Wis. Stat. Ch. 980 [§ 3.2]

A. Prehistory and Origins of Wis. Stat. Ch. 980 [§ 3.3]

Like many states, Wisconsin enacted a statute permitting the commitment of what it termed "sexual psychopaths" in the first half of the 20th century. 1947 Wis. Laws ch. 459. *See generally* Deborah W. Denno, *Life Before the Modern Sex Offender Statutes*, 92 Nw. U. L. Rev. 1317 (1998). That statute eventually came to be codified in Wis. Stat. ch. 975. Though this chapter is still on the books, the Wisconsin Legislature eliminated new commitments under the law as of July 1, 1980. Wis. Stat. § 975.01; 1979 Wis. Laws ch. 117.

In 1990, the state of Washington enacted the first of what would become a new wave of commitment laws aimed at those convicted of sex offenses. *See* Juliet M. Dupuy, *The Evolution of Wisconsin's Sexual Predator Law*, 79 Marq. L. Rev 873 (1996). Twenty states, the federal government, and the District of Columbia now have some form of sex offender commitment. Arielle W. Tolman, *Sex Offender Civil Commitment to Prison Post*-Kingsley, 113 Nw. U. L. Rev. 155, 166 (2018). Wisconsin joined this number in 1994 with the passage of 1993 Wis. Act. 479, which created Wis. Stat. ch. 980.

As of late 2020, there were 229 people confined at Sand Ridge who had been committed under Wis. Stat. ch. 980, with another 36 undergoing commitment proceedings. As of May 4, 2021, an additional 74 people were in the community on supervised release. In the 26 years since enactment of Wis. Stat. ch. 980, 176 committed people have been discharged.

B. Major Revisions [§ 3.4]

1. In General [§ 3.5]

Wis. Stat. ch. 980 has gone through several substantial revisions over the past three decades. An attorney must be mindful of these changes; some of the major cases dealing with Wis. Stat. ch. 980 analyze language that no longer exists and thus contain statements that are no longer accurate. Notable changes include those in trial proceedings and the rights of the respondent, discharge standards and procedure, and supervised release standards, procedure, and placement, discussed, in turn, below.

2. Trial Proceedings and Rights of Respondent [§ 3.6]

As is discussed more fully in section 3.44, *infra*, for its first 10 years of existence, Wis. Stat. ch. 980 specified that at trial a respondent had "[a]ll constitutional rights available to a defendant in a criminal proceeding." Wis. Stat. § 980.05(1m) (1993–94). That language was repealed by 2005 Wis. Act 434, though as the Wisconsin Supreme Court has noted, "[e]ven without [that] language … Chapter 980 continues to offer several protections similar to those allowed criminal defendants." *Milwaukee Cnty. v. Mary F.-R. (In re Mental Commitment of Mary F.-R.)*, 2013 WI 92, ¶ 22 n.19, 351 Wis. 2d 273, 839 N.W.2d 581. The rights afforded to Wis. Stat. ch. 980 respondents are now explicitly spelled out by the statute itself. Wis. Stat. § 980.03.

3. Discharge Standards and Procedure [§ 3.7]

The earliest version of Wis. Stat. ch. 980 provided for a "probable cause" hearing to determine whether a discharge proceeding should be held; a committed person had the right to counsel for this hearing but no right to be present. Wis. Stat. § 980.09(2)(a) (1993–94). 2005 Wis. Act 434 eliminated the "probable cause" language, saying instead that a committed person was entitled to a discharge trial if "facts exist from which a court or jury could conclude the person does not meet criteria for commitment." Wis. Stat. § 980.09(2) (2005–06); *State v. Arends (In re Commitment of Arends)*, 2010 WI 46, ¶ 35, 325 Wis. 2d 1, 784 N.W.2d 513. This language was again modified by 2013 Wis. Act 84, which amended Wis. Stat. ch. 980 to provide for a trial if the record "contains facts from which a court or jury would likely conclude the person no longer meets the criteria for commitment." Wis. Stat. § 980.09(2). Wisconsin Supreme Court justices have been unable to agree on what burden this language describes. *State v. Hager (In re Commitment of Hager)*, 2018 WI 40, ¶ 1, 381 Wis. 2d 74, 911 N.W.2d 17, which failed to reach a majority for any position, is discussed in section 3.35, *infra*.

4. Supervised Release Standards, Procedure, and Placement [§ 3.8]

As originally enacted, Wis. Stat. ch. 980 did not mandate institutional confinement when a person was initially committed. Rather, a committing court could order supervised release from the beginning. Wis. Stat. § 980.06(2) (1993–94). This option was eliminated by 1999 Wis. Act 9, §§ 3223h–3223k. *State v. Rachel (In re Commitment of Rachel)*, 2002 WI 81, ¶¶ 8–15, 254 Wis. 2d. 215, 647 N.W.2d 762. A committed person is now automatically confined at Sand Ridge and must petition for supervised release; the first petition is permitted only after one year of commitment. Wis. Stat. § 980.08(1).

Both the standard and the procedure for obtaining supervised release have also changed extensively. Initially the state was obligated to show by clear and convincing evidence that the person continued to meet the criteria for institutional confinement. Wis. Stat. § 980.08(4) (1993–94). 2003 Wis. Act 187 kept this burden of proof on the state but changed what needed to be shown: that the person had failed to make significant progress in treatment or had refused treatment. Wis. Stat. §§ 980.01(am), 980.08(4)(b) (2003–04). But in 2005, the legislature shifted the burden to the committed person to prove the person meets five specific criteria. 2005 Wis. Act 434, §§ 116, 118; Wis. Stat. § 980.08(4)(cg); *State v. West (In re Commitment of West)*, 2011 WI 83, ¶¶ 52–59, 336 Wis. 2d 578, 800 N.W.2d 929; *Rachel*, 2002 WI 81, ¶¶ 8–9, 324 Wis. 2d 465.

For most of its history, Wis. Stat. ch. 980 permitted the DHS—which supervises people on supervised release—to place a person outside his or her county of residence if it found "good cause" to do so. *See* Wis. Stat. § 980.08(4)(cm) (2015–16). This discretion was eliminated by 2017 Wis. Act 184; all supervised release placements must now be in the county of the person's residence. 2017 Wis. Act 184 also shifted responsibility to the county of residence to locate housing for the person while on supervised release.

III. A Needle in the Haystack—Distinguishing a Sexually Violent Person [§ 3.9]

A. In General [§ 3.10]

The U.S. Supreme Court has established that a sexually violent person must be uniquely distinguishable from the much larger set of sexual offenders. In upholding the Kansas sexually violent person civil commitment law, the Court found the Kansas statute constitutional because it required proof of facts sufficient to distinguish a sexually violent person "from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997). In *Kansas v. Crane*, 534 U.S. 407, 413 (2002), the Court sharpened the constitutional requirement: A commitment regime must "distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case."

Wis. Stat. ch. 980 follows the constitutional bounds established in *Hendricks* and *Crane* by requiring proof of three distinct statutory elements before one can be deemed to be a sexually violent person. To be considered a sexually violent person, one must (1) have a prior conviction or adjudication for a sexually violent offense, (2) have a mental disorder, and (3) be dangerous because of that mental disorder. Wis. Stat. § 980.01(7).

B. Prior Adjudication [§ 3.11]

1. Per Se Sexually Violent Offenses [§ 3.12]

To be considered for commitment under Wis. Stat. ch. 980, a person must have a prior adjudication for a sexually violent offense. Wis. Stat. §§ 980.01(7), 980.02(2)(a). Typically this adjudication is a conviction; however, the statute also allows for commitment of an individual who has been adjudicated delinquent for, or found not guilty by reason of mental disease or defect for, a sexually violent offense. Wis. Stat. §§ 980.01(7), 980.02(2)(a). Sexually violent offense is a term of art, precisely defined by statute. Wis. Stat. § 980.01(6). This is often a point of confusion for those unfamiliar with the law; a sexually violent offense need not involve an act of physical violence as that term is often understood.

Determining what qualifies as a sexually violent offense is as easy as consulting the list of qualifying offenses provided by statute. Offenses that are automatically deemed sexually violent are enumerated in Wis. Stat. § 980.01(6)(a). These offenses are listed in Table 1 below.

940.225(1)	**First-Degree Sexual Assault**

940.225(2)	**Second-Degree Sexual Assault**
940.225(3)	**Third-Degree Sexual Assault**
948.02(1)	**First-Degree Sexual Assault of a Child**
948.02(2)	**Second-Degree Sexual Assault of a Child**
948.025	**Repeated Sexual Assault of a Child**
948.06	**Incest with a Child**
948.07	**Child Enticement**
948.08	**Sexual Assault of a Child Placed in Substitute Care**

Table 1: Per se sexually violent offenses

A conviction or adjudication for soliciting, attempting, or conspiring to commit any of the listed offenses also qualifies as a sexually violent offense. Wis. Stat. § 980.01(6)(c).

2. Sexually Motivated Offenses [§ 3.13]

In addition to the above crimes—which are categorically sexually violent offenses—some additional offenses are deemed sexually violent if the prosecution proves that the offenses were sexually motivated. These offenses are listed in Wis. Stat. § 980.01(6)(b) and provided in Table 2 below.

940.01	**First-Degree Intentional Homicide**
940.02	**First-Degree Reckless Homicide**
940.03	**Felony Murder**
940.05	**Second-Degree Intentional Homicide**
940.06	**Second-Degree Reckless Homicide**
940.19(2)	**Battery – Substantial Bodily Harm**
940.19(4)	**Battery – Great Bodily Harm**
940.19(5)	**Battery – Great Bodily Harm (Intentional)**
940.19(6)	**Battery – Substantial Risk of Great Bodily Harm**

940.195(4)	**Battery to Unborn Child – Great Bodily Harm**
940.195(5)	**Battery to Unborn Child – Great Bodily Harm (Intentional)**
940.3	**False Imprisonment**
940.305	**Taking Hostages**
940.31	**Kidnapping**
941.32	**Administering Dangerous or Stupefying Drug**
943.1	**Burglary**
943.32	**Robbery**
948.03	**Physical Abuse of a Child**

Table 2: Offenses requiring sexual motivation

In cases in which the qualifying offense requires sexual motivation, this motivation is a factual issue subject to the same burden of proof as all other elements. Wis. Stat. § 980.05(3). The legislature has provided some guidance by defining sexual motivation, though the definition is imprecise and subject to interpretation. An act is *sexually motivated* if "one of the purposes for [it] is for the actor's sexual arousal or gratification or for the sexual humiliation or degradation of the victim." Wis. Stat. § 980.01(5).

The only appellate case to examine the sexual motivation requirement under Wis. Stat. ch. 980 is *State v. Watson*, 227 Wis. 2d 167, 595 N.W.2d 403 (1999). The *Watson* court did not establish what sorts of facts are required to establish a connection between an offense and an individual's sexual motivation. *Watson* instead determined that an expert witness can offer an opinion on sexual motivation if the opinion is based on a sufficient foundation. *Id.* at 190–91. While expert witnesses may consider inadmissible hearsay in formulating an opinion, a court may conclude that an opinion based *solely* on inadmissible hearsay is insufficient to meet even a probable cause standard. *Id.* at 203.

Attorneys may also want to consider *State v. Jackson*, 2012 WI App 76, 343 Wis. 2d 602, 819 N.W.2d 288, which examined the facts a court is permitted to look to in determining that an offense was sexually motivated for purposes of imposing the sex offender registry requirement. *Jackson* held it was error to rely on the facts of a read-in offense to find sexual motivation, particularly given that three days had elapsed between the read-in offense and the crime of conviction. *Id.* ¶ 28. While *Jackson* does not address Wis. Stat. ch. 980, the opinion's logic seems applicable and, at a minimum, may be instructive in Wis. Stat. ch. 980 cases.

3. Effect of Vacated or Reversed Judgment [§ 3.14]

Wis. Stat. ch. 980 provides specific statutory guidance for how to handle judgments of conviction, or adjudications, that are reversed, vacated, or set aside *after* a person has been committed based on a petition relying on the overturned order. Wis. Stat. § 980.101. This is a highly uncommon scenario given the typical lengths of sentences imposed for crimes that would qualify as acts of sexual violence. Because the initial sentences typically are lengthy, Wis. Stat. ch. 980 proceedings most commonly occur long after the time for appellate review has passed.

The rule created by the statute is that if the conviction, or adjudication, that was overturned was the *sole basis* for the Wis. Stat. ch. 980 petition, and the person has no other convictions or adjudications that would qualify, then a court must vacate the Wis. Stat. ch. 980 commitment order. Wis. Stat. § 980.101(2)(a). If the person has other prior convictions or adjudications that would count as sexually violent offenses, then the court must consider whether the overturned conviction or adjudication probably would change the result of the original

trial. Wis. Stat. § 980.101(2)(b). If the court concludes that it would, then the court must grant a new commitment trial under Wis. Stat. § 980.05. *Id.* In either circumstance, a challenge to the Wis. Stat. ch. 980 commitment must be brought as a motion for postcommitment relief. Wis. Stat. § 980.101(2).

C. Mental Disorder [§ 3.15]

The second element required for commitment is a mental disorder. As with the term sexually violent offense, the term mental disorder in Wis. Stat. ch. 980 has a precise definition that may differ from lay understandings of the phrase. It is not enough to have a "mental illness" or "mental disorder" as those terms may be understood colloquially or clinically.

Wis. Stat. ch. 980 defines a *mental disorder* as "a congenital or acquired condition affecting the emotional or volitional capacity *that predisposes a person to engage in acts of sexual violence*." Wis. Stat. § 980.01(2) (emphasis added). This predisposition requirement is a signal feature of a Wis. Stat. ch. 980 mental disorder: The person's mental illness or abnormality must be directly and causally linked not merely to criminality or lawlessness but also to acts of sexual violence. This feature of the statutory definition—sometimes referred to as the "nexus" between mental disorder and dangerousness—is necessary to the constitutionality of the entire statutory scheme. The Wisconsin Supreme Court upheld the commitment regime in part because "persons will not fall within chapter 980's reach unless they are diagnosed with a disorder that has the specific effect of predisposing them to engage in acts of sexual violence." *State v. Post*, 197 Wis. 2d 279, 306, 541 N.W.2d 115 (1995).

Some diagnoses will have an evident nexus to sexual offenses. For example, pedophilic disorder is among those described by the *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*. This disorder involves "intense and recurrent sexual urges toward and fantasies about prepubescent children that have either been acted upon or which cause the person … distress or interpersonal difficulty." Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)* (5th ed. 2013). But for other disorders, such as antisocial personality disorder (ASPD), the link is less clear and often must be developed by examining an individual's history of behavior.

Additionally, the disorder must involve not only a person's thoughts but also a propensity to act. The disorder must cause the individual serious difficulty in controlling his or her behavior. This requirement, although not explicitly contained in the statutory definition of mental disorder, was clarified by the Wisconsin Supreme Court in *State v. Laxton (In re Commitment of Laxton)*, 2002 WI 82, 254 Wis. 2d 185, 647 N.W.2d 784. There, the court found that the proof required to show an individual has a mental disorder "implicitly includes proof that such person's mental disorder involves serious difficulty in controlling his or her sexually dangerous behavior." *Id.* ¶ 23. If a person has pedophilic thoughts, but has acquired enough volitional control to not act on them, he or she does not have a mental disorder under Wis. Stat. ch. 980.

Practice Tip. The Wisconsin Court of Appeals has held that ASPD, standing alone and without an additional sexual disorder, is sufficient to satisfy the Wis. Stat. ch. 980 definition of a mental disorder. *State v. Adams (In re Commitment of Adams)*, 223 Wis. 2d 60, 588 N.W.2d 336 (Ct. App. 1998). Other courts, though, have decided to the contrary: that ASPD, by itself, is insufficient for civil commitment. *See, e.g.*, *State v. Donald DD*, 21 N.E.3d 239 (N.Y. 2014); *United States v. Wilkinson*, 646 F. Supp. 2d 194 (D. Mass. 2009). Within the scientific community it also remains an unresolved question. The majority of the prison population would qualify for an ASPD diagnosis; however, only a small subset fit criteria for commitment as a sexually violent person. See *Wilkinso*n, 646 F. Supp. 2d at 205, for a discussion of learned treatises.

D. Risk [§ 3.16]

The third element the state must prove before committing a person under Wis. Stat. ch. 980 is commonly referred to as the risk element. To be considered a sexually violent person, one must be dangerous because "he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence." Wis. Stat. § 980.01(7). The statute defines *likely* in this context as "more likely than not." Wis. Stat. § 980.01(1m). Thus, for commitment, the state must prove that an individual is more likely than not to commit an act of sexual violence if he or she is not detained.

Proof of this element usually comes in the form of expert testimony. Psychology researchers have spent many hours trying to determine which characteristics are predictive of individuals who will reoffend sexually and what defines individuals who will not reoffend. Researchers have taken the items that have the greatest predictive validity from a scientific and statistical standpoint and grouped them in a variety of actuarial instruments. These actuarial instruments are designed so that an expert can take the score of a person being evaluated and compare it to reference groups for which a recidivism rate is known from looking historically at the success or failure of individuals with that same score. These actuarial instruments are often divided into two types of instruments: static instruments and dynamic instruments.

Static risk instruments look at factors correlated to sex offense recidivism that are unchangeable or static. Examples of these factors include the number of prior convictions, the sex of the victim, whether the victim was a stranger, and whether the person being evaluated has ever been in a long-term relationship. The most widely used of these static actuarial instruments is the Static-99R. *See* Static-99 Clearinghouse, *Static-99/Static-99R*, http://www.static99.org (last visited Apr. 29, 2021). The Static-99R is a revised version of a previous instrument, known as the Static-99, with an updated age item. The revision was necessary to account for advances in research that showed age has a large effect on recidivism. The Static-99R is comprised of 10 items, and the total score an individual can receive on the instrument ranges from -3 to 12. The age item allows for the greatest fluctuation in scoring, ranging from +1 point for a person under the age of 35 to -3 points for individuals over the age of 60.

An individual's score on an instrument, standing alone, does not provide any meaningful information regarding whether that person does, or does not, meet criteria for commitment under Wis. Stat. ch. 980. To translate that score into a meaningful risk prediction, the evaluator must use recidivism data from reference groups that have been provided by the authors of the instrument. A reference group is comprised of individuals who have been released from custody and followed over varying periods of time to determine how many individuals have gone on to be charged or convicted of a new sex offense. The reference groups are large enough samples that statistical methods can be used to establish a rate of recidivism for each actuarial score.

The Static-99R authors have published two reference groups for the Static-99R, the Routine sample and the High Risk/High Needs sample. The High Risk/High Needs sample is comprised entirely of offenders from other countries, whereas the Routine sample contains some offenders from the United States. The authors of the Static-99R stress that evaluators should select the reference group most similar to the individual being evaluated; however, there has been no definitive method for making that determination published. Evaluators have been left to establish their own criteria for selecting which sample to use.

Note. Arguably the most scientifically sound method of selecting a reference group is to use the sample with rates of recidivism that best resemble those in the jurisdiction where the evaluation is being done. Although the Routine sample and the High Risk/High Needs sample are both comprised of individuals at all risk levels and scores, the Routine sample has a much lower base rate, i.e., the overall rate of reoffense for the sample as a whole. The base rate for the Routine sample is 8.3% after a 5-year period of follow-up (n=4,325 with 358 recidivists). Amy Phenix, Leslie-Maaike Helmus & R. Karl Hanson, *Static-99R & Static-2002R Evaluators' Workbook* (2016), http://www.static99.org. For the High Risk/High Needs sample, the base rate over the same 5-year time is 19.1% (n=860 with 164 recidivists). *Id.* Because of the statistical methods used to determine recidivism rates by score, a higher base rate will increase the reported recidivism rates across all scores. Contemporary studies within the United States seem to consistently show recidivism rates more in line with the Routine sample than the High Risk/High Needs Sample. *See* Joseph R. Tatar II & Anthony Streveler, Wis. Dep't of Corr., *Sex Offender Recidivism after Release from Prison* (2015), https://doc.wi.gov/DataResearch/RecidivismReincarceration/SexualOffenderRecidivismReport.pdf (Wisconsin recidivism rate among 12,849 sex offenders released from Department of Corrections (DOC) custody ranged from 2.9% at 3 years to 8% at 15 years of follow-up); *see also* Marcus T. Boccaccini, Amanda Rice, Leslie-Maaike Helmus, Daniel C. Murrie & Paige B. Harris, *Field Validity of Static-99/R Scores in a Statewide Sample of 34,687 Convicted Sexual Offenders*, Psych. Assessment 29(6), 611–23 (2017) (overall base rate among 34,687 Texas sex offenders was 3.6%); Gregory DeClue & Amanda Rice, *Florida's Released "Sexually Violent Predators" Are Not "High Risk*," Open Access J. Forensic Psych. 8, 22–51 (2016) (base rate for Florida SVP offenders was 9.2% after 5 years of follow-up; after 10 years of follow-up, base rate for those selected for sexually violent person commitment became indistinguishable from the rate for randomly selected sex offenders from the general population).

Dynamic risk instruments measure factors related to sexual offending that can change. Many of these factors reflect antisocial attitudes or disordered belief systems that were likely operating at the time of a person's past offense. These factors are not immutable characteristics, however, and can change with time or in response to treatment or other interventions. Dynamic risk instruments can measure the degree to which these risk factors are still present or have been reduced. Progress in treatment or the reduction of dynamic risk factors can serve to reduce an individual's risk below that provided by a static actuarial risk instrument. The dynamic risk instrument most used by DHS evaluators is the Violence Risk Scale Sex Offender Version (VRS-SO). *See* Psynergy.ca, *Violence Risk Scale Sexual Offense Version (VRS-SO)*, https://psynergy.ca/vrs-so (last visited Apr. 29, 2021).

Actuarial instruments offer risk percentages over limited periods of follow-up. Under Wis. Stat. ch. 980, the fact-finder is required to consider a person's risk of committing a sexual offense at any point in the future. The statute does not give a temporal limitation and thus allowances need to be made to assess a person's lifetime risk. Although there is a continuing possibility that an individual may reoffend, research has found reductions in risk for every year spent in the community without committing additional offenses. The authors of the Static-99R have recently published one method for accounting for both lifetime risk and this risk-reducing effect; however, other methods also exist. David Thornton, R. Karl Hanson, Sharon M. Kelley & James C. Mundt, *Estimating Lifetime and Residual Risk for Individuals Who Remain Sexual Offense Free in the Community: Practical Applications*, Sexual Abuse (2019),

http://doi.org/10.1177/1079063219871573 (pre-publication copy available at http://static99.org/pdfdocs/Thorntonetal2019PreprintEstimatingLifetimeandResidualRisk.pdf).

Additionally, researchers are limited in defining recidivism as a new arrest, a new charge, or a new conviction. Offenses that may occur but are not reported to authorities escape detection and are not part of the rates provided in research. There is much debate within the scientific community regarding how profoundly this alters the ultimate risk reported by the actuarial instruments and how to measure the unmeasurable. What seems to be universally agreed upon is that some degree of underreporting must be accounted for.

Wis. Stat. ch. 980 also defines a sexually violent person as someone who is at risk of committing a future act of sexual violence. As discussed in sections 3.9 and 3.10, *supra*, sexually violent offenses are a narrow subset of sex offending more generally. Because research on recidivism does not constrain itself only to offenses that Wisconsin law considers to be sexually violent, there may be some degree of overreporting by the actuarial instruments as well. Actuarial instruments, because of their statistical nature, also include confidence intervals to account for margins of error. An expert must account for all these factors before arriving at a final estimate of an individual's risk.

The Wisconsin Court of Appeals has provided clarification that the term "more likely than not" as used in Wis. Stat. § 980.01(1m) means a greater than 50% risk. *State v. Smalley* (*In re Commitment of Smalley)*, 2007 WI App 219, 305 Wis. 2d 709, 741 N.W.2d 286. Experts and fact-finders must evaluate the predicted risk against this 50% threshold. A helpful visualization is to think of 50% as the hurdle the state must clear to prove commitment. If any portion of the confidence interval falls below 50%, that uncertainty is like a runner's foot hanging below the hurdle, and the hurdle will not be cleared.

IV. Petition Process—Initiating Wis. Stat. Ch. 980 Proceedings [§ 3.17]

A. Initial Review [§ 3.18]

1. In General [§ 3.19]

To be considered for potential Wis. Stat. ch. 980 commitment, a person must be in custody. Wis. Stat. § 980.02(1m). One form of custody is a prison sentence; the sentence must be either for a sexually violent offense or for a sentence that is running consecutive to or concurrent with a sexually violent offense. *State v. Watson*, 227 Wis. 2d 167, 181, 595 N.W.2d 403 (1999); *State v. Treadway (In re Commitment of Treadway)*, 2002 WI App 195, ¶ 18, 257 Wis. 2d 467, 651 N.W.2d 334; *State v. Keith*, 216 Wis. 2d 61, 72, 573 N.W.2d 888 (Ct. App. 1997). See section 3.12, *supra*, for a list of qualifying offenses.

The other form of custody that can make a person eligible for Wis. Stat. ch. 980 proceedings is a commitment following a finding that the person is not guilty due to mental disease or defect (NGI). Because either of two state agencies may have custody—the DOC for prisoners and the DHS for NGI committees—there are two parallel processes.

The statute also allows the state to petition for commitment of individuals in juvenile custody after a delinquency finding for a sexually violent offense. This process would be substantially the same as the process for adults coming out of the DOC prison system because the juvenile correctional institutions fall under the umbrella of the DOC. This process is seldom used as of late given the advances in research that show individuals who have only committed offenses as adolescents have a low risk of recidivism. Michael F. Caldwell, *Quantifying the Decline in Juvenile Sexual Recidivism Rates*, Psych., Pub. Pol'y & L. (July 18, 2016) (abstract available at https://www.researchgate.net/publication/305415034_Quantifying_the_Decline_in_Juvenile_Sexual_Recidivism_Rates).

2. Department of Corrections [§ 3.20]

The DOC process is outlined in the DOC *Electronic Case Reference Manual*, published in April 2020. https://doc.wi.gov/GuidanceDocumentsV2/DAI/DOC_ECRM_April%202020%20Publication.pdf.

The process begins approximately one year before a person's scheduled release date. The first step in the process is review by a chapter 980 specialist. This specialist reviews file material for all inmates with a qualifying offense and who are nearing release. If the specialist determines that further attention is necessary, those individuals are referred to the DOC End of Confinement Review Board (ECRB).

The ECRB, a multimember panel, more closely scrutinizes the file material relied on by the chapter 980 specialist and often supplements it with additional material from collateral sources. At this stage, the ECRB may also use actuarial risk tools. If the ECRB

determines that a person might meet criteria for commitment, it refers the person to the DOC Chapter 980 Forensic Evaluation Unit for further evaluation.

The forensic evaluation unit is comprised of several psychologists who conduct evaluations of all individuals referred to them by the ECRB. The written product of this evaluation is called a special purpose evaluation (SPE). In preparing an SPE, the evaluator will consult material in the DOC file, as well as any additional information relating to past offenses. The subject individual has the right to participate in an interview, although doing so is not required and declining to participate cannot be held against a person. After reviewing all the information, the evaluator prepares a written report addressing each of the statutory elements under Wis. Stat. ch. 980: prior conviction (and sexual motivation if required), mental disorder, and risk.

An SPE that opines that the individual may meet criteria is commonly known as an "SPE-Yes" determination. A case for which the evaluator cannot conclude the criteria are likely met is called an "SPE-No" determination. An SPE-No determination is the end of the process and the subject is released from custody as scheduled. An SPE-Yes leads to one last step within the DOC.

Following an SPE-Yes determination, the DOC must notify the DOJ and the relevant district attorney of the person's anticipated release and some additional information about the person. Wis. Stat. § 980.015. A DOC request is a prerequisite for the filing of a petition. The DOJ has the first chance to file; only if it declines does the decision fall to the district attorney. *See infra* § 3.22. This statutory process is described in Wis. Stat. § 980.02(1)(a), and the supreme court has held that a request from the agency with custody is a mandatory requirement for a valid petition. *State v. Byers (In re Commitment of Byers)*, 2003 WI 86, 263 Wis. 2d 113, 665 N.W.2d 729.

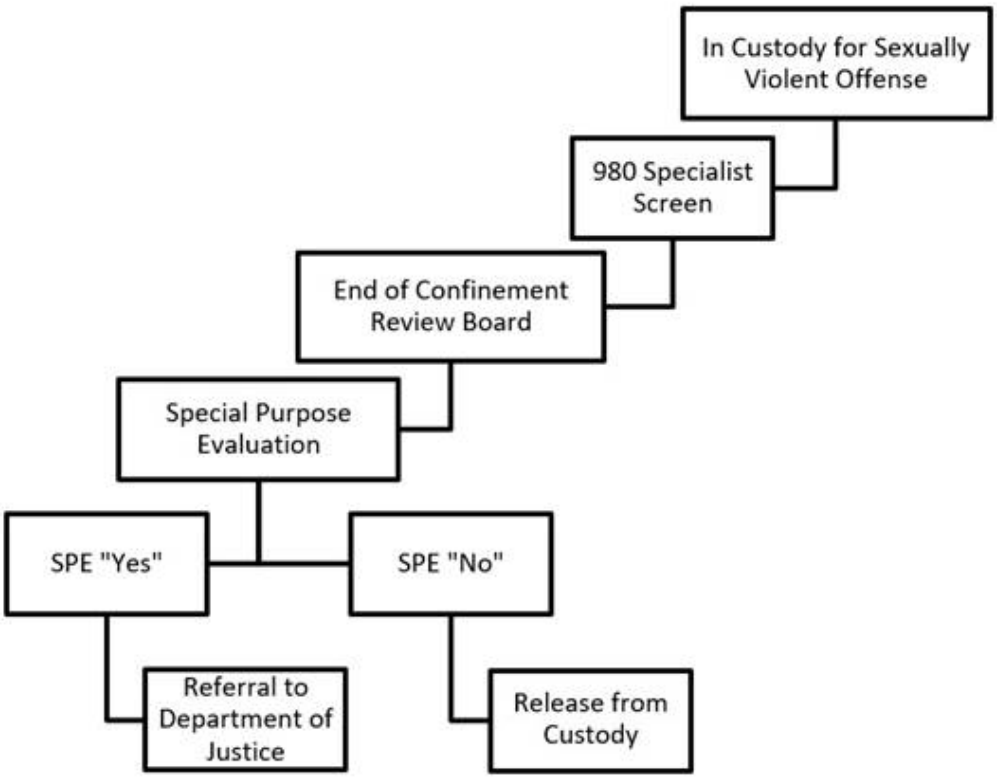

Chart 1: DOC selection process

3. Department of Health Services [§ 3.21]

A person found NGI under Wis. Stat. § 971.17 is committed to the custody of the DHS. Wis. Stat. § 980.015(2)(c)–(d) requires the DHS to give notice to the DOJ and the relevant district attorneys when (1) it is anticipated that a person will be placed on conditional release, (2) the person's Wis. Stat. § 971.17 commitment is nearing an end because it is likely to be terminated by a court, or (3) the person's Wis. Stat. § 971.17 commitment is nearing an end because the person is nearing the end of the term. Any of these three events triggers a screening process like that for individuals approaching release from DOC custody.

The DHS has its own evaluators who conduct evaluations under Wis. Stat. §§ 980.04 and 980.07. Wis. Admin. Code ch. DHS 99 describes the qualifications for these evaluators. As with the DOC process, an evaluation concluding the criteria are not met means the

person will be released and not subjected to Wis. Stat. ch. 980 proceedings, while a contrary conclusion leads to notices and a request for a petition to the DOJ and the relevant district attorney.

B. Petition [§ 3.22]

A request from either the DOC or the DHS does not mean a petition will be filed; the DOJ has the first opportunity to file or to decline to file. Wis. Stat. § 980.02(1)(a). If (and only if, *see State v. Byers*, 2003 WI 86, ¶ 43, 263 Wis. 2d 113, 665 N.W.2d 729) the DOJ declines, the petition can be filed by a district attorney from any of three locations: (1) the county where the conviction or adjudication for the sexually violent offense occurred, (2) the county where it is anticipated that the person will reside upon release, or (3) the county where the person is in custody. Wis. Stat. § 980.02(1). Because Wis. Stat. ch. 980 proceedings are a specialty with few knowledgeable attorneys, some counties have made regional agreements to entrust this duty to a shared special prosecutor.

A petition must be filed before the respondent's actual release. Wis. Stat. § 980.02(1m). In terms of contents, a petition must state facts alleging that (1) the person is in custody for a sexually violent offense; (2) the person has a mental disorder; and (3) the person is dangerous to others, meaning that the individual's risk to reoffend exceeds the legal threshold. Wis. Stat. § 980.02(2). If the underlying offense is not a per se sexually violent offense but one that requires sexual motivation (*see supra* § 3.13), then the petition "shall state the grounds on which the offense or act is alleged to be sexually motivated." Wis. Stat. § 980.02(3).

Wis. Stat. ch. 980 provides three possible venues for the filing of a petition, and a fourth if the DOJ files the petition. The language mirrors that regarding which district attorneys may file a petition: It allows a petition to be filed in (1) the circuit court for the county where the person was convicted of, or adjudicated for, a sexually violent offense; (2) the court for the county in which the person intends to reside upon release; or (3) the court for the county where the person is in custody. Wis. Stat. § 980.02(4). If the DOJ files the petition, it may also elect to file in the Dane County Circuit Court. Wis. Stat. § 980.08(5). In larger counties that assign different branches to criminal and civil matters, Wis. Stat. ch. 980 petitions are typically filed in a criminal branch.

V. Evolution of a Wis. Stat. Ch. 980 Case [§ 3.23]

A. Initial Review, Detention, and Appointment of Counsel [§ 3.24]

Once a petition has been filed, the circuit court must review the petition to decide whether it shows probable cause to believe that the person is a sexually violent person. Wis. Stat. § 980.04(1). If the petition is sufficient on its face, the court will issue a detention order, requiring that the person be held until a full probable cause hearing can be conducted. *Id.* Upon the filing of a petition and scheduling of a probable cause hearing, the subject of the petition is entitled to representation by counsel and notice is required to be given to the State Public Defender's Office (SPD). The SPD appoints counsel regardless of whether the person is indigent. Wis. Stat. § 980.03(2)(a).

B. Probable Cause Hearing [§ 3.25]

A full probable cause hearing must be held within 10 days after an individual's scheduled release date if the person is being released or discharged from a sentence, dispositional order, or commitment order. Wis. Stat. § 980.04(2)(b)2. For all other circumstances, the probable cause hearing must be held within 30 days after the filing of a petition. Wis. Stat. § 980.04(2)(b)1. Either of these time periods may be extended if the court finds good cause based on a motion or the parties' stipulation. Wis. Stat. § 980.04(2)(b)1.–2.

A probable cause hearing under Wis. Stat. ch. 980 is similar to a preliminary hearing in a felony criminal matter. The state must present evidence to establish probable cause for each of the three criteria for commitment. Typically, documentary evidence, such as a certified copy of a judgment of conviction, is introduced to establish a prior conviction or adjudication. As to the remaining elements—mental disorder and risk—the state most commonly calls to testify the expert who authored the SPE or the Wis. Stat. § 980.015 evaluation. The respondent has the right to cross-examine the state's witnesses, to present his or her own, and to remain silent. Wis. Stat. § 980.03. However, as at a criminal preliminary hearing, the defense often makes a strategic decision to rely solely on cross-examination and argument at this stage of the case.

After listening to all evidence and argument, if the court determines that there is probable cause to believe that the person is a sexually violent person, it must order the person detained and transferred to a DHS facility for further evaluation. Wis. Stat. § 980.04(3). Sand Ridge is the facility the DHS most often uses to house individuals before and after commitment under Wis. Stat. ch. 980. If probable cause has not been established, then the court must dismiss the petition and order the person released.

Following a probable cause determination, the court is also required to schedule a trial on the petition within 90 days. Wis. Stat. § 980.05(1). A trial may be to either the court or a jury. If either the state or the defense desires that the trial be to a jury, then a specific demand must be made within 10 days after the probable cause hearing. Wis. Stat. § 980.05(2). Absent a demand, the trial is to the court. Any request for a change of venue must also be filed within 20 days after the probable cause hearing and must follow the procedure set forth in Wis. Stat. § 980.034.

Note. Even though the statute provides for a trial within 90 days after the probable cause hearing, in actual practice this seldom occurs. The additional evaluations contemplated by Wis. Stat. §§ 980.04 and 980.031 must be performed, and there are a limited number of examiners who can perform them. Discovery materials often comprise thousands of pages. Thus, 90 days is often insufficient to prepare a Wis. Stat. ch. 980 case for trial. Ultimately it is the choice of the subject of the petition, in consultation with counsel, whether to waive the statutory time limits.

C. Pretrial Preparation [§ 3.26]

After a finding of probable cause, the DHS is required to conduct an evaluation to determine "whether the person is a sexually violent person." Wis. Stat. § 980.04(3). Additionally, the person is entitled to his or her own independent examiner. Wis. Stat. § 980.031(3). If the person is indigent, the court must appoint this examiner at county expense. *Id.* The court may also appoint its own independent examiner under Wis. Stat. § 980.031(1), and either party may retain additional examiners. All examiners must be afforded equal access to the records necessary for rendering an opinion. Wis. Stat. § 980.031(4).

Though it is called a civil proceeding, Wis. Stat. ch. 980 has its own exclusive discovery provisions and is not governed by the general civil rules. Wis. Stat. § 980.036. The state is not required to provide any discovery until after a probable cause hearing. Wis. Stat. § 980.036(3m). Between the probable cause hearing and trial, both parties have extensive discovery obligations enumerated in the statute. They are much the same as those in criminal cases. *See* Wis. Stat. § 971.23.

Note. Reports authored by any examiners must be filed at least 10 days before the trial. Wis. Stat. § 980.031(5). This is a strict prerequisite to receipt of the expert testimony. A court is not allowed to permit an expert to "testify at any proceeding under this chapter unless a written report of his or her examination has been submitted to the court and to both parties at least 10 days before the proceeding." *Id.*

D. Trial [§ 3.27]

1. Evidentiary Rules [§ 3.28]

Wis. Stat. § 980.05(1m) (2003–04) originally provided that Wis. Stat. ch. 980 trials were conducted under criminal rules of evidence (which are largely the same as the civil rules, Wis. Stat. § 972.11). With the repeal of that statute by 2005 Wis. Act 435, it appears the civil rules govern, Wis. Stat. § 901.01, supplemented by the few scattered provisions in Wis. Stat. ch. 980. *See* Wis. Stat. §§ 980.038(2), 980.05(4), 980.105(2m)(a).

Case law has established a couple additional rules for Wis. Stat. ch. 980 trials.

The first is that Wis. Stat. § 904.04(2), important to many civil and criminal actions, does not apply to the crucial questions of mental disorder and dangerousness. The general rule of this statute is that evidence of prior "crimes, wrongs, or acts" is not admissible to show a person's character trait "in order to show that the person acted in conformity" with that trait. Variously known as other-acts evidence, propensity evidence, and *Sullivan* evidence (*State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998)), whether a particular instance of conduct is admissible, and for what purpose, generates a great deal of litigation.

In *State v. Franklin (In re Commitment of Franklin)*, 2004 WI 38, ¶ 14, 270 Wis. 2d 271, 677 N.W.2d 276, though, the supreme court held that the rule forbids other-acts evidence only to show how a person *has acted*—not how the person *will act*. Given that the existence of a "mental disorder" is a question about a person's present state rather than past acts, and "dangerousness" involves a prediction about a person's future behavior, the court held that Wis. Stat. § 904.04(2) does not forbid the introduction of evidence about prior bad acts in this context. *Id.*

The second is that applicability of the *Daubert-Frye* standard depends on the date of the filing of the initial petition. Wisconsin adopted this standard for the admission of expert testimony on February 1, 2011. 2011 Wis. Act. 2, § 45(5). The standard applies in civil and criminal actions commenced on or after that date. In *State v. Alger (In re Commitment of Alger)*, 2015 WI 3, 360 Wis. 2d 193, 858 N.W.2d

346, though, the supreme court held that in cases in which an original Wis. Stat. ch. 980 petition for commitment was filed before this date, the old "limited-gatekeeper" standard continues to apply to later supervised-release and discharge proceedings.

2. Trial Procedure [§ 3.29]

At the initial commitment trial, the state must prove each of the three statutory elements beyond a reasonable doubt. Wis. Stat. § 980.05(3)(a). If the qualifying offense is one that requires sexual motivation, then the state must also "prove beyond a reasonable doubt that the alleged sexually violent act was sexually motivated." Wis. Stat. § 980.05(3)(b).

If trial is to a jury, the default number of jurors is 12 and, as in a criminal trial, any verdict must be unanimous. Wis. Stat. §§ 980.03(3), 980.05(2). The parties may stipulate before trial to a smaller number of jurors, Wis. Stat. § 980.05(2m)(c), but this does not change the requirement of a unanimous verdict. Jury selection is conducted as it would be in ordinary civil actions, except that each party is entitled to an additional peremptory challenge or, if the court allows, an additional two peremptory challenges (i.e., a total of either four or five peremptory challenges). Wis. Stat. § 980.05(2m)(a).

Following the close of evidence, the court or jury must decide whether the state has proved beyond a reasonable doubt that the respondent is a sexually violent person. If it has so proved, the court must order the respondent to be committed to the care and custody of the DHS until such time as he or she is no longer a sexually violent person. Wis. Stat. § 980.06.

Wisconsin law originally required the court to decide whether the committed person needed institutional care or whether the person could be managed on supervised release. Wis. Stat. § 980.06(2) (1993–94). Now, however, all persons committed under Wis. Stat. ch. 980 must initially be placed in institutional care. If the state fails to meet its burden, then the person must be released in accordance with the requirements of his or her original sentence, dispositional order, or commitment.

E. Annual Evaluation [§ 3.30]

After a person has been committed under Wis. Stat. ch. 980, the DHS is required to conduct a yearly evaluation of the person's current mental condition. Wis. Stat. § 980.07. The DHS evaluator conducting this yearly examination must consider the criteria for discharge and for supervised release and must opine whether either is appropriate. Wis. Stat. § 980.07(1).

Staff at the records unit at Sand Ridge keep track of the "lock date" for all committed individuals. The "lock date" refers to the date when an initial commitment order was entered by a court. Every year, several weeks before that date, Sand Ridge staff will present the patient with several forms. One form allows the patient to either consent to or opt out of an interview with the DHS evaluator. Another form allows the patient to request appointment of counsel, an independent examiner, or both. Finally, patients are given form petitions for supervised release and discharge, although these form petitions must often be supplemented with additional material to comply with the statutory pleading requirements discussed in section 3.31, *infra*. Wis. Stat. § 980.07(6)(b).

Closer to the "lock date," the DHS evaluator will interview the patient if consent has been given, review records, and write a report. This report is sent to the state and the court and to counsel for the patient if counsel has been appointed. Attorneys often call this the "07 evaluation" after the statutory subsection that requires it, Wis. Stat. § 980.07. In this report, the evaluator will offer an opinion as to the existence of a current mental disorder, the patient's current risk of committing a sexually violent offense, and whether the patient meets criteria for supervised release. If the evaluator concludes that the patient either no longer has a mental disorder or no longer exceeds the statutory risk threshold of more likely than not to commit an act of sexual violence, then the evaluator will recommend that the patient be discharged.

In addition to the 07 evaluation, a treatment progress report is submitted to the court and parties on a yearly basis. Wis. Stat. § 980.07(4). The DHS employs a separate group of evaluators tasked solely with authoring these treatment progress reports. A treatment progress report does not offer an opinion as to mental disorder, risk, or discharge. Instead, the report is aimed solely at the treatment needs and progress of the patient, as well as providing an opinion as to whether the patient is making "significant progress in treatment" as that phrase is defined in Wis. Stat. § 980.01(8). Significant progress in treatment is a prerequisite to a finding that the patient is ready for supervised release.

Each time that a patient is subject to an annual evaluation under Wis. Stat. § 980.07, he or she is entitled to appointment of an examiner under Wis. Stat. § 980.031(3) to act on his or her behalf. Wis. Stat. § 980.07(1). If the patient is represented by counsel, often that attorney will make arrangements with an examiner to ensure compatibility of calendars and that the examiner has time within his or her schedule to accept the appointment. Counsel will then typically file a motion or request with the court asking for the appointment of that examiner, pursuant to Wis. Stat. § 980.031. Any results and report generated by the examiner appointed to act on the patient's behalf are confidential

and not required to be disclosed until the patient decides that he or she will be calling that expert as a witness. *State v. Rachel (In re Commitment of Rachel)*, 224 Wis. 2d 571, 591 N.W.2d 920 (1999).

VI. Supervised Release [§ 3.31]

Supervised release is one of the two avenues out of institutional custody, with discharge being the other. Supervised release is intended to be a mechanism to reintegrate patients into society after they have completed inpatient treatment. Supervised release sometimes is referred to as the fourth phase of a four-phase treatment program. Patients placed on supervised release are subject to strict supervision and monitoring by the DHS and because they are still under a commitment order can be returned to Sand Ridge if rule violations or dangerous behavior occurs. Because of the stringent controls the DHS places on individuals in the supervised release program, the recidivism rate is extremely low. Information about the Wisconsin Supervised Release Program is available at https://www.dhs.wisconsin.gov/sr/statistics.htm (last revised May 5, 2021). As of October 2020, 245 individuals have been released to the community under the program. Of those 245 individuals, only 3 have been charged with a new sexual offense.

Note. A charge for a new sexual offense does not imply that these three individuals committed a new sexually violent offense as defined by Wis. Stat. ch. 980.

A petition for supervised release is not a complicated pleading and requires only a brief and plain statement and request for relief. Unlike with a petition for discharge, which can be filed at any time, a patient must wait 12 months after an initial commitment order before petitioning. Wis. Stat. § 980.08(1). Additionally, if a patient previously petitioned for supervised release, or was previously placed on supervised release, he or she must wait until 12 months after that previous petition was denied, or supervised release revoked, before petitioning again. *Id.* Once a petition for supervised release is filed, and if the statutory waiting period has been met, the court must grant the patient a trial. The trial must commence within 120 days after the filing of the report of the court-appointed examiner. Wis. Stat. § 980.08(4)(a).

Note. In practice, the time limits are less clear. The supervised-release statute states that upon filing of a petition, the court "shall" appoint one or more examiners to examine the person and file a written report. Wis. Stat. § 980.08(3)(a). It is the filing of the report of this court-appointed examiner that triggers the 120-day period for holding a supervised-release trial. It is the experience of the authors that courts often forego the appointment of this additional expert and the court and parties instead rely on the reports and examinations conducted by the DHS professionals and any experts the state or defense may have obtained.

A supervised-release trial is always to the court. There is no provision within Wis. Stat. ch. 980 that allows a jury to decide the issue of supervised release. At trial, the burden of proof is borne by the patient petitioning for supervised release to demonstrate by clear and convincing evidence that he or she meets each of the five statutory criteria in Wis. Stat. § 980.08(4)(cg). Several of the statutory criteria are not characteristics of the person but attributes of the supervised-release program and the services and programs the DHS can provide. The criterion that is most often in dispute between the state and petitioning patient is criterion 1: whether the patient is making significant progress in treatment.

Significant progress in treatment is defined in Wis. Stat. § 980.01(8) and consists of four separate factors. First, the person must be "[m]eaningfully participating in the treatment program specifically designed to reduce his or her risk to reoffend offered." Wis. Stat. § 980.01(8)(a). Except for patients who are refusing treatment, this factor is almost always satisfied by a patient seeking supervised release. The second factor is that the patient must be participating in treatment "at a level that is sufficient to allow the identification of his or her specific treatment needs." Wis. Stat. § 980.01(8)(b). The patient must also demonstrate a commitment to working on addressing those treatment needs. The third factor builds on the second and requires the patient to show that he or she understands "the thoughts, attitudes, emotions, behaviors, and sexual arousal linked to his or her sexual offending" and can identify when those thoughts occur. Wis. Stat. § 980.01(8)(c).

The fourth factor requires that the patient be "demonstrating a sufficiently sustained change" in the thoughts and behaviors identified in treatment and the previous factors. Wis. Stat. § 980.01(8)(d). This last factor is often in dispute because there is no clear guidance as to what is meant by "sufficiently sustained change." Evaluators usually take the phrase to mean a change in behavior over time but often cannot agree how long a period is required.

Comment. The statute's definition of "significant progress in treatment" makes it an unattainable standard for a small population of patients at Sand Ridge. Those who have a developmental disability, degenerative brain disorder, or serious and persistent mental illness are often unable to participate in treatment at the same level as their peers without such ailments. Because significant progress in treatment seems to be an objective standard, rather than a subjective one, an individual's capacity to participate is not a consideration. A patient with cognitive ailments may max out the treatment benefit individually attainable for them yet not be able to be released. This is

a concern because with no additional treatment benefit possible, Wis. Stat. ch. 980 serves to simply warehouse these patients in the institution, despite the fact that many could meet the remaining supervised release criteria and be safely managed in the community.

After a trial, if a court finds that the patient has proved each of the statutory criteria by clear and convincing evidence, the court must find the patient appropriate for supervised release. Wis. Stat. § 980.08(4)(cg). This finding does not mean the patient is immediately released. Instead, the finding of eligibility triggers the next step in the process, whereby the county of which the person is a resident must locate and propose a residence. Wis. Stat. § 980.08(4)(dm). Once a residence is found, the DHS must prepare and submit a supervised-release plan. Wis. Stat. § 980.08(4)(f). Only after the court has reviewed and approved the supervised-release plan is a person actually placed on supervised release.

VII. Discharge [§ 3.32]

A. In General [§ 3.33]

A committed person, whether confined at Sand Ridge or on supervised release, has the right to petition for discharge. Such a petition is a request for a trial at which the state will be obligated to show that the person continues to meet the three criteria for commitment; if it cannot, the commitment will end. Not every petition, however, results in a discharge trial.

B. Timing of Discharge Petitions [§ 3.34]

A person can file a discharge petition "at any time." Wis. Stat. § 980.09(1). Unlike petitions for supervised release under Wis. Stat. § 980.08, *supra* § 3.31, and requests for discharge from other forms of commitment, there is no statutory "cooling off" period between petitions. *See, e.g.*, Wis. Stat. §§ 51.20(16)(c), 971.17(4)(a). Other aspects of the statute, though, tend to result in petitions being filed once per year at most.

First, on filing a petition a committed person has the right to have the court appoint an expert examiner at county expense. This is only true, though, if the court has not previously appointed an examiner "for the current reexamination period," a yearly cycle. Wis. Stat. § 980.09(1m)(d). Because most people committed under Wis. Stat. ch. 980 are indigent, lack of a court-appointed examiner is a substantial barrier.

Second, that yearly reexamination tends to prompt petitions, because the DHS is required to present a committed person with a "standardized petition form for discharge" along with the completed reexamination report. Wis. Stat. § 980.07(6)(b).

Finally, the burden of production a person must meet to secure a discharge trial discourages the filing of frequent petitions. This burden, described in the following section, requires the person to show that something has changed since the last trial that could bring about a different result.

C. What Must Be Shown to Obtain a Discharge Trial [§ 3.35]

As is described in section 3.7, *supra*, the showing required to secure a discharge trial has changed twice over the life of Wis. Stat. ch. 980, so attorneys should be cautious when relying on older cases. The current law, enacted by 2013 Wis. Act 84, requires the court to set a trial if "the record contains facts from which a court or jury would likely conclude the person no longer meets the criteria for commitment." Wis. Stat. § 980.09(2). The same provision refers to whether "the person's condition has sufficiently changed," which has led the courts to conclude that the pertinent "facts" that could lead to a favorable finding must have arisen since the most recent trial—either an original commitment or a prior discharge trial. *State v. Combs (In re Commitment of Combs)*, 2006 WI App 137, ¶ 32, 295 Wis. 2d 457, 720 N.W.2d 684. These "facts" can be, but need not be, facts about the committed person. As is described in section 3.16, *supra*, the research regarding the third criterion, dangerousness, is constantly advancing. A person also is entitled to a discharge trial if he or she can point to a new development in this field of knowledge that would support a favorable finding. *Id.*; *State v. Ermers (In re Commitment of Ermers)*, 2011 WI App 113, ¶¶ 12, 16, 336 Wis. 2d 451, 802 N.W.2d 540.

A committed person seeking discharge typically submits one or more expert reports in support, though doing so is not required; the statute directs the court to consider these reports along with any other submissions, the record, and the arguments of counsel in determining whether facts exist that mandate a trial. Wis. Stat. § 980.09(2).

So, what does it mean for the record to "contain[] facts" from which a fact-finder "would likely conclude" the person does not meet the criteria for commitment? This question was presented, but not definitively resolved, in *State v. Hager (In re Commitment of Hager)*, 2018

WI 40, 381 Wis. 2d 74, 911 N.W.2d 17. A plurality of justices (along with two in dissent) held that the Constitution does not permit a court to "weigh" evidence favorable to a petitioner against evidence that would support continued commitment. *Id.* ¶ 31; *id.* ¶ 84 (Abrahamson, J., dissenting). Thus, a court that is deciding whether to hold a discharge trial does not serve as a fact-finder, and any hearings under Wis. Stat. § 980.09(2) are not "evidentiary" in the sense of permitting judgments of credibility or the drawing of favorable or unfavorable inferences. The *Hager* court could reach no binding majority, though, for just what burden of production the "would likely conclude" language places on the discharge petitioner.

When the case was before the court of appeals, however, the court observed and the state conceded at oral argument that, "from a pleading standpoint, 'would likely conclude' is not an unattainable, or even generally difficult, standard." *State v. Hager*, 2017 WI App 8, ¶ 33, 373 Wis. 2d 692, 892 N.W.2d 740, *rev'd*, 2018 WI 40, 381 Wis. 2d 74, 911 N.W.2d 17. Progress in treatment, a new diagnosis, a "change" in the person himself, or changes in the professional knowledge and research may all constitute evidence that a person is no longer suitable for commitment. *Id.*

D. Pretrial Proceedings [§ 3.36]

A discharge petition may be filed with or without counsel and with or without the support of an expert. A petition prepared by a self-represented individual need not be served on the state; the circuit court is obligated to complete this service. Wis. Stat. § 980.09(1m)(a).

The court is also required to notify the public defender of the filing of a petition by a self-represented individual "as soon as circumstances permit" for the appointment of counsel. Wis. Stat. § 980.09(1m)(b). (The statute still refers to "indigency determination," but this is in error; 2017 Wis. Act 184 eliminated indigency requirements for appointments under Wis. Stat. ch. 980 (though there are provisions for the state to recoup the cost of representation).)

On request of the committed person, the court must also appoint an expert for the person at county expense, unless it has already appointed one within the annual examination period. Wis. Stat. § 980.09(1m)(d).

In *State v. Arends (In re Commitment of Arends)*, 2010 WI 46, ¶ 4, 325 Wis. 2d 1, 784 N.W.2d 513, the supreme court described a two-step review process for determining whether a person receives a discharge trial. For the first step, set out in Wis. Stat. § 980.09(1), the court examines only the petition to see whether it "alleges facts" meeting the person's production burden. If it does not allege such facts, it must be dismissed without trial. If the petition does allege such facts, the court is to proceed to a hearing under Wis. Stat. § 980.09(2) at which the petition's allegations are considered in light of other items in the record, supporting documentation, and the arguments of counsel.

Caveat. Though Wis. Stat. § 980.09(1), read in isolation, might suggest otherwise, the next subsection, Wis. Stat. § 980.09(1m), makes clear that the court may not dismiss the petition in the first step without appointing both counsel and, if requested, an examiner for the person. *See State v. Jones (In re Commitment of Jones)*, 2013 WI App 151, ¶ 10, 352 Wis. 2d 87, 841 N.W.2d 306. (*Jones* based its holdings on the now-repealed Wis. Stat. § 980.075, but the provisions it relied on have all been recreated elsewhere in the statute.) In fact, it is routine for the committed person to file a statutorily mandated "standard form" discharge petition that is inadequate, because he or she is without counsel when the opportunity to file is presented. The court may not dismiss such a petition out of hand; it must first appoint counsel. Only after counsel is appointed and given the opportunity to file an amended petition (typically supported by the report of an examiner) may the court consider whether the person's filings are adequate.

2013 Wis. Act 84 amended some of the pertinent language of Wis. Stat. § 980.09, and no case has determined whether the two-step *Arends* process was altered along with the substantive pleading standard. The statute seems to contradict itself, saying the court "shall" dismiss an insufficient petition "without a hearing" but later saying the court "in reviewing the petition … may hold a hearing" to determine if the person has met his burden of production. The confusion may stem from a change in terminology; what the statute now calls discharge "trials" were once known as discharge "hearings." *Compare* Wis. Stat. § 980.09(2)–(3), *with* Wis. Stat. § 980.09(2)–(3) (2011–12). It seems safe to say that a circuit court always has the power to hold a hearing, even when a petition may not be sufficient on its face; this is the better practice, particularly given that, as noted above, many petitions are filed by self-represented individuals, with counsel (and an expert examiner) appointed only later.

E. Discharge Trials [§ 3.37]

If the court determines that a discharge trial should be held, the court must hold the trial within 90 days. Wis. Stat. § 980.09(3). Any party has the right to demand a six-person jury within 10 days after the court's determination that a trial will be held. Wis. Stat. § 980.095(1)(a). Five of the six jurors must agree on any verdict. Wis. Stat. § 980.095(1)(c).

The issues at such a trial are the same as at an original commitment: The state bears the burden to show the person meets the criteria for commitment. Wis. Stat. § 980.09(3); *see supra* §§ 3.11–.16. The only difference is the weight of that burden: At a discharge trial the state must prove each element by clear and convincing evidence, rather than beyond a reasonable doubt as at an initial commitment. Wis. Stat. § 980.09(3).

If the state fails to meet its burden, the person is discharged from the commitment. Wis. Stat. § 980.09(4). The court must stay the order of discharge to permit the DHS to notify the DOC and the victim of the committed person's sexually violent offense(s) (or sometimes a victim's family member). This stay can last no more than 10 working days and must be the minimum time necessary for the DHS to provide the required notice. Wis. Stat. §§ 980.09(5), 980.11(2)–(3).

If the court or jury finds the state has met its burden, commitment continues. Wis. Stat. § 980.09(4). If discharge is denied, the court (not the jury) next determines whether the person meets the criteria for supervised release under Wis. Stat. § 980.08(4), unless this determination is waived by the committed person. Wis. Stat. § 980.09(4); *see supra* § 3.31.

A discharge from a Wis. Stat. ch. 980 commitment does not end the state's supervisory powers over the person. Any remaining extended supervision (which in many cases will be lifetime supervision under Wis. Stat. § 939.615) or parole will continue to run. In addition, all persons who formerly were committed under Wis. Stat. ch. 980 are subject to lifetime sex offender registration, Wis. Stat. § 301.45(5)(b)2., and, arguably, lifetime GPS monitoring, Wis. Stat. § 301.48(2)(b)1., 2.

VIII. Constitutional and Quasi-Constitutional Rights [§ 3.38]

A. In General [§ 3.39]

Being committed under Wis. Stat. ch. 980 results in a massive curtailment of a person's liberty. The person is confined indefinitely at Sand Ridge; conditions at this institution are similar in many ways to those in the state prisons. Supervised release is eventually afforded to some committed persons, but this status also involves close control of the person's daily life by the DHS.

This potential deprivation of liberty carries with it a set of procedural protections for a person subjected to Wis. Stat. ch. 980 proceedings. Some of these protections resemble (or are identical to) the constitutional rights afforded a criminal defendant. Some are derived instead from the law that has developed around civil commitments. The source of some of these protections is unclear and, as with other aspects of Wis. Stat. ch. 980, has changed over the years. This section surveys the litigation and statutory provisions that have established the general contours of a committed person's constitutional or quasi-constitutional rights in a Wis. Stat. ch. 980 proceeding.

B. Double Jeopardy or Ex Post Facto [§ 3.40]

Shortly after enactment of Wis. Stat. ch. 980, several people challenged the proceedings against them as violating double jeopardy or ex post facto protections. Four circuit courts agreed that the law was unconstitutional; appeals from these rulings were consolidated. In opinions released on the same day—*State v. Carpenter*, 197 Wis. 2d 252, 541 N.W.2d 105 (1995), and *State v. Post*, 197 Wis. 2d 279, 541 N.W.2d 115 (1995)—the Wisconsin Supreme Court upheld the law against these challenges, saying the statute was not punitive and thus not subject to the prohibition against double jeopardy or ex post facto laws.

C. Equal Protection and the Jury Trial [§ 3.41]

Carpenter and *Post* also raised equal-protection and due-process challenges to the new law. The court rejected all due-process challenges (relying in part on several procedural protections no longer contained in the statute) and all equal-protection challenges save one: It held that discharge proceedings must include the right to a jury, despite the statute's failure to provide for this. *State v. Post*, 197 Wis. 2d 279, 328–29, 541 N.W.2d 115 (1995). For an original commitment trial, the statute now provides that any party or the court has the right to elect a jury trial. Wis. Stat. § 980.03(3). The number of jurors is 12 unless the parties and the court agree to a smaller jury. Wis. Stat. § 980.05(2), (2m)(c). Any verdict from such a jury must be unanimous. Wis. Stat. § 980.03(3). For a discharge trial, either party may request a jury, which is set at 6 people with 5 votes needed for a verdict. Wis. Stat. § 980.095(1)(a), (c).

D. Right to Counsel [§ 3.42]

Wis. Stat. ch. 980 provides a statutory right to counsel at various junctures: for a commitment trial, for discharge and supervised release petitions and proceedings, and for appeal. Wis. Stat. §§ 980.04(5), 980.08(2), 980.09(1m), 809.30(2)(d), 977.07(c). The supreme court has held that any statutory right to counsel includes the right to the effective assistance of counsel, *Winnebago Cnty. v. J.M. (In re Mental*

Commitment of J.M.), 2018 WI 37, ¶ 35, 381 Wis. 2d 28, 911 N.W.2d 41, and that a violation of that right is established by the deficient performance and prejudice test of *Strickland v. Washington*, 466 U.S. 668 (1984). *J.M.*, 2018 WI 37, ¶ 29, 381 Wis. 2d 28.

E. Burden of Proof [§ 3.43]

Substantive due process dictates that the burden of persuasion as to whether a person meets the standards for commitment lies with the state. *State v. Hager (In re Commitment of Hager)*, 2018 WI 40, ¶ 41, 381 Wis. 2d 74, 911 N.W.2d 17. The U.S. Constitution sets the floor for this burden, requiring the state to show each element by at least clear and convincing evidence. *Foucha v. Louisiana*, 504 U.S. 71, 81–82 (1992); *Addington v. Texas*, 441 U.S. 418, 431–32 (1979).

The statute imposes a higher burden on the state for initial commitments: The state must prove each element beyond a reasonable doubt. Wis. Stat. § 980.05(3). The burden at a discharge trial is the lesser clear-and-convincing standard. Wis. Stat. § 980.09(3). (In contrast, the committed person carries the burden to show, by clear and convincing evidence, that he or she meets the criteria for supervised release. Wis. Stat. § 980.08(4)(cj).) *See supra* §§ 3.29, .31, .37.

F. Compelled Statements and Confrontation [§ 3.44]

Wisconsin Stat. § 980.05(1m) once provided that a person the state seeks to commit had all the constitutional rights of a criminal defendant. These rights included the right against compelled statements and the right of confrontation. *State v. Mark (In re Commitment of Mark)*, 2006 WI 78, ¶ 28, 292 Wis. 2d 1, 718 N.W.2d 90; *State v. Watson*, 227 Wis. 2d 167, 202, 595 N.W.2d 403 (1999). This provision was repealed by 2005 Wis. Act 434. However, Wis. Stat. § 980.03(2)(b) and (c) continue to provide the rights to remain silent and to cross-examine witnesses. The Wisconsin Supreme Court has said that even without the criminal-trial rights, "Chapter 980 continues to offer several protections similar to those allowed criminal defendants." *Milwaukee Cnty. v. Mary F.-R. (In re Mental Commitment of Mary F.-R.)*, 2013 WI 92, ¶ 22 n.19, 351 Wis. 2d 273, 839 N.W.2d 581. The court also held, in *State v. Spaeth (In re Commitment of Spaeth)*, 2014 WI 71, ¶ 27 n.13, 355 Wis. 2d 761, 850 N.W.2d 93, that compelled statements are still inadmissible in Wis. Stat. ch. 980 trials.

G. Equal Protection [§ 3.45]

Some litigants have claimed that Wis. Stat. ch. 980 deprives them of equal protection. These challenges have compared facets of the Wis. Stat. ch. 980 regime to other commitment statutes: Wis. Stat. § 51.20 (civil commitments for those who are dangerous because of mental illness) and Wis. Stat. § 971.17 (commitments after a criminal defendant is found not guilty by reason of mental disease or defect). The courts have rejected most challenges. See, e.g., *State v. Carpenter*, 197 Wis. 2d 252, 541 N.W.2d 105 (1995); *State v. Post*, 197 Wis. 2d 279, 541 N.W.2d 115 (1995) (discussed in sections 3.15, 3.40, and 3.41, *supra*); and *State v. West (In re Commitment of West)*, 2011 WI 83, ¶ 99, 336 Wis. 2d 578, 800 N.W.2d 929 (holding that statute placing burden of proof on committed person seeking supervised release did not violate equal protection or due process). The exception, noted in section 3.41, *supra*, is *Post*'s holding that equal protection requires the right to a jury at a discharge trial.

H. Due Process [§ 3.46]

The U.S. Supreme Court has held that the Due Process Clause forbids sex offender commitments absent a showing of mental abnormality that causes "serious difficulty in controlling behavior." *Kansas v. Crane*, 534 U.S. 407, 413 (2002). Wisconsin's high court upheld Wis. Stat. ch. 980 against a claim that it fails to meet this standard in *State v. Laxton (In re Commitment of Laxton)*, 2002 WI 82, ¶ 22, 254 Wis. 2d 185, 647 N.W.2d 784. *Laxton* held that the statutory text "requires a nexus between the mental disorder and the individual's dangerousness" which "necessarily … involves proof that the person's mental disorder involves serious difficulty" in controlling behavior. *Id.*

The state supreme court has held that due process was violated when the circuit court failed to timely commence discharge proceedings. *State v. Beyer (In re Commitment of Beyer)*, 2006 WI 2, ¶ 18, 287 Wis. 2d 1, 707 N.W.2d 509.

I. Competency [§ 3.47]

A criminal defendant has a constitutional due-process right (in addition to the statutory right conferred in Wis. Stat. § 971.13(1)) not to be tried if he or she "lacks substantial mental capacity to understand the proceedings or assist in his or her own defense." In *State v. Smith (In re Commitment of Smith)*, 229 Wis. 2d 720, 600 N.W.2d 258 (Ct. App. 1999), the court of appeals held that this right extended to Wis. Stat. ch. 980 respondents. That holding depended on the since-repealed Wis. Stat. § 980.05(1m), which provided a Wis. Stat. ch. 980

respondent all the trial rights of a criminal defendant, but the court also noted that competence was "necessary to meaningfully exercise the other rights" the same statute conferred. *Smith*, 229 Wis. 2d at 729.

As is noted in preceding sections, at least some of the rights Wis. Stat. § 980.05(1m) once contained survive its repeal, so this portion of the court's reasoning would still pertain. *State v. Luttrell (In re Commitment of Luttrell)*, 2008 WI App 93, ¶ 11, 312 Wis. 2d 695, 754 N.W.2d 249, rejected the respondent's argument that he was entitled to a competency determination and noted the repeal of Wis. Stat. § 980.05(1m), but it also noted that that particular respondent would not be subject to either a Wis. Stat. ch. 51 or ch. 55 commitment, so there would be no way, other than by use of Wis. Stat. ch. 980, for the state to protect the public from any danger he might pose. After *Luttrell*, it is unclear whether a Wis. Stat. ch. 980 respondent who *might* be subject to another form of commitment (which is one possible outcome of an incompetency determination in criminal matters) is entitled to a competency determination before proceeding under Wis. Stat. ch. 980.

IX.
Postcommitment Proceedings and Appeals [§ 3.48]

A. In General [§ 3.49]

Post-trial and appellate proceedings under Wis. Stat. ch. 980 resemble other aspects of the law—though nominally civil, they are conducted under rules usually applied to criminal matters. This means that a person who has been newly committed or one who has had a petition for discharge or conditional release denied must look to Wis. Stat. § 809.30 for next steps. Wis. Stat. §§ 980.038(4)(a), 809.30(1)(b)4. In the rare case in which the state seeks review, its recourse is to Wis. Stat. § 808.04 and the civil appeal rules of Wis. Stat. chs. 808 and 809. Wis. Stat. § 980.038(4)(b).

B. Wis. Stat. § 809.30 Basics [§ 3.50]

Most broadly, Wis. Stat. § 809.30 establishes what is usually a two-step process for challenging any final circuit court action. Most claims that a committed person seeks to raise must first be brought in the circuit court by postcommitment motion. (Wis. Stat. § 809.30 speaks of "postdisposition motions" and Wis. Stat. ch. 980 of "postcommitment motions" but the terms are interchangeable.) Claims not first presented by motion generally cannot be litigated on appeal.

There are two exceptions to this rule. First, a claim that the evidence was insufficient can be raised for the first time in the court of appeals. Second, any "issues previously raised" (and, presumably, decided) in the circuit court need not be brought back before it. Wis. Stat. § 809.30(2)(h). For example, a circuit court's ruling on an objection at trial, or on a motion in limine, is preserved for appeal.

Practice Tip. Though a postcommitment motion is not necessary for preserved issues or claims of insufficiency, it also is not forbidden. Whether to give the circuit court another chance to rule on such claims is often a matter of strategy.

C. Nuts and Bolts: Who Is Litigating and How [§ 3.51]

Most people subjected to commitment proceedings under Wis. Stat. ch. 980 have counsel appointed by the SPD. Unlike in criminal matters, a person is entitled to the appointment of counsel regardless of indigency, both for circuit court proceedings and appeals. Wis. Stat. § 980.03(2)(a). When a committed person wishes to contest commitment or the denial of discharge or conditional release, the attorney who represented the person in the circuit court should file a notice of intent to pursue postdisposition relief within 20 days after the contested action. Wis. Stat. § 809.30(2)(b). This notice triggers the procedure that leads to the appointment of postdisposition or appellate counsel; this counsel must then order needed transcripts and file either a postdisposition motion or a notice of appeal within 60 days after receipt of the transcripts.

Practice Tip. Although it is possible for a privately retained lawyer to represent the committed person in both trial and postdisposition or appellate proceedings, doing so should be avoided. A committed person has the right to the effective assistance of trial counsel, and many viable claims (such as those that have not been preserved) must be raised under the umbrella of ineffective assistance. A lawyer who has represented the person at trial will not be able to raise such claims and so should give way to new counsel.

As with trial proceedings, in postdisposition matters the state may be represented either by the DOJ or the local district attorney's office. The DOJ handles all appeals under Wis. Stat. ch. 980. Wis. Stat. § 165.25(1).

Practice Tip. Wis. Stat. §§ 806.04 and 893.825 may require service of other entities that are not party to the appeal. If an action involves a challenge to the constitutionality of a state statute or "the construction or validity of a statute," a "copy of the proceeding" must be served on the attorney general (even if the state is represented by a district attorney's office), the speaker of the state assembly, the president of the senate, and the senate majority leader. Wis. Stat. §§ 806.04(11), 893.825. This rule is not limited to appeals; by its terms it applies also to matters in the circuit court. Note also that the statute does not define "copy of the proceeding." Though the statute does not require proof of service, it may be prudent to make a record of service to assuage any concerns the court of appeals may have.

Practice Tip. Postdisposition proceedings followed by an appeal can easily take well over a year to complete. When it comes to appeals from the denial of discharge or supervised release, this means that a committed person typically has the right to commence a new petition while the previous one is still on appeal. Appellate counsel should be aware of the potential for mootness and be prepared to advise a client about whether a new petition would be advantageous.

X. Implications for the Criminal Defense Attorney [§ 3.52]

The possibility of a future Wis. Stat. ch. 980 commitment must guide strategic deliberations—and inform client decisions—in any criminal case involving serious sexual (or sexually motivated) crimes. Most basically, a conviction for some offenses, whether obtained by conviction or by plea, will mean that a client's confinement is not guaranteed to end on the day of release from initial confinement in prison. Beyond simple eligibility by offense, the likelihood of Wis. Stat. ch. 980 commitment can be substantially influenced—by way of commonly used actuarial instruments, *see supra* § 3.16—by the nature and number of convictions and by the characteristics of the victim. A client's conduct in prison, including participation in treatment, can also materially affect the odds he or she will be subject to Wis. Stat. ch. 980 proceedings and commitment.

Practice Tip. Possible lifetime confinement in a secure facility is plainly a serious matter. The prospect of being subjected to Wis. Stat. ch. 980 is something nearly any reasonable defendant would take into consideration in deciding whether to plead or go to trial and in deciding what offenses he or she might plead to. Any competent and diligent criminal defense attorney must thus inform the client of this possibility in situations when it exists, and further should counsel as to what actions would make Wis. Stat. ch. 980 commitment more or less likely. If anything, this task is made more important by the Wisconsin Supreme Court's decision in *State v. LaMere*, 2016 WI 41, 368 Wis. 2d 624, 879 N.W.2d 580, holding that Wis. Stat. ch. 980 commitment is not a "direct consequence" of a guilty plea. This means that the client who pleads in ignorance of the possibility (and in some cases, likelihood) of indefinite confinement has no recourse: The client cannot withdraw the plea.

For an attorney with a client facing the possibility of commitment, either because of a conviction in the case of representation or because the client will serve a consecutive or concurrent sentence for a Wis. Stat. ch. 980-eligible crime, there are additional considerations. First, it is likely that the DOC will offer such a client some form of sex offender treatment while he or she is incarcerated. Whether to participate in the treatment can be a difficult choice. On one hand, successful completion may cause the DOC, and later evaluators, to view the person as less of a risk to reoffend and thus less appropriate for commitment. On the other hand, treatment typically involves the person being pressed to admit all prior inappropriate sexual behavior. This can include sex offenses of which the person has never been accused as well as other matters that can *increase* the relevant actors' perceptions of risk. Also, the state has been known to use writings a person generated as part of treatment, which might include detailed and very disturbing accounts of sexual violence, to persuade a jury of a person's dangerousness in a Wis. Stat. ch. 980 proceeding.

Defense attorneys may also want to take advantage of the evolving field of research on sex offense recidivism more generally. Most famously, in *McKune v. Lile*, 536 U.S. 24, 33–34 (2002), Justice Kennedy proclaimed that sex offenders have a "frightening and high risk of recidivism," further estimating that rate to be as high as 80%. This "frightening and high" risk has been repeatedly cited as the basis for increasingly onerous restrictions on individuals who have at one time been convicted of a sex offense. The contemporary base rates discussed in section 3.16, *supra*, show that the true rate of recidivism is nowhere near the rates claimed in the *McKune* decision. Defense attorneys should make use of this new research and use it to confront and challenge restrictions placed on their clients who face conviction for, or have been convicted of, a sexual offense.

Chapter 4
Guardianships

Hon. Patrice A. Baker

Note. The author has chosen to use gender-neutral pronouns (e.g., "they," "them," "their") in the writing of this chapter. Mental health issues affect people regardless of sex or gender identity.

I. Scope [§ 4.1]

This chapter provides an overview of the intersection between mental health and guardianships. This chapter examines mental illness in the context of a guardianship and protective placement proceeding, with a focus primarily on adult guardianships (minor guardianships are examined in more detail in chapter 5, *infra*). A separate chapter covers mental illness in the context of civil commitments; see chapter 2, *supra*. Sections of this chapter discuss the "treatability" of mental illness and whether a guardianship and protective placement are appropriate or whether, instead, a less restrictive alternative is available for an individual. This chapter includes practical guidelines to determine whether an individual with a mental health diagnosis is truly in need of a guardianship and protective placement, both of which may permanently deprive a ward of important rights and powers. [3]

II. Navigating the Legal System [§ 4.2]

A. Statutory Authority [§ 4.3]

Adult guardianships are governed by Wis. Stat. ch. 54, and protective placements are governed by Wis. Stat. ch. 55. A guardian is appointed for a person who does not have the capacity to make decisions pursuant to the incapacity standard set out in Wis. Stat. § 54.01(15). A person may also have to be "protectively placed" by a court pursuant to Wis. Stat. § 55.01(6).

Jurisdiction, venue, and time limits are not the focus of this chapter. Helpful and straightforward guidance on these important topics related to both guardianships and protective placement appears in 5 *Wisconsin Judicial Benchbook—Probate, Guardianship, and Mental Health* (State Bar of Wis. 5th ed. 2016 & Supp.).

B. Proper Subject for Guardianship [§ 4.4]

1. Permanency Versus Treatability [§ 4.5]

A guardianship is needed when an individual has a mental condition or impairment that is or is likely to be permanent and renders the individual unable to make decisions. *Impairment* means a developmental disability, serious and persistent mental illness, degenerative brain disorder, or other like incapacities. Wis. Stat § 54.01(14). The chronic nature of a mental condition or impairment does not, alone, justify the appointment of a guardian.

The Wisconsin Legislature defines mental illness for purposes of Wis. Stat. ch. 51 civil commitments differently than it does for purposes of either Wis. Stat. ch. 54 guardianships or protective placements (also covered by Wis. Stat. ch. 54).

2. Definitions [§ 4.6]

a. Definition of "Mental Illness" in the Context of Civil Commitment [§ 4.7]

Mental illness for purposes of a civil commitment is a condition that can be improved or made better by medication and treatment. Treatment and medication do not equate with a "cure." Wis. Stat. § 51.01(13) provides:

(a) "Mental illness" means mental disease to such extent that a person so afflicted requires care and treatment for his or her own welfare, or the welfare of others, or of the community.
(b) "Mental illness", for purposes of involuntary commitment, means a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life, but does not include alcoholism.

Treatment for purposes of civil commitment under Wis. Stat. ch. 51 means "those psychological, educational, social, chemical, medical or somatic techniques designed to bring about rehabilitation of a mentally ill, alcoholic, drug dependent or developmentally disabled person." Wis. Stat. § 51.01(17).

The inquiry necessary for purposes of civil commitment is whether the individual's functional baseline will improve or be made better by treatment. If it will not be made better by those interventions, then civil commitment under Wis. Stat. ch. 51 is not the proper avenue.

b. Definition of "Mental Illness" in a Guardianship [§ 4.8]

Serious and persistent mental illness for the purpose of a Wis. Stat. ch. 54 guardianship means that even with administration of psychotropic medications and treatment, the individual's condition cannot be made better or improved back to their functional baseline. The individual's condition is permanent in nature.

> "Serious and persistent mental illness" means a mental illness that is severe in degree and persistent in duration, that causes a substantially diminished level of functioning in the primary aspects of daily living and an inability to cope with the ordinary demands of life, that may lead to an inability to maintain stable adjustment and independent functioning without long-term treatment and support and that may be lifelong duration. "Serious and persistent mental illness" includes schizophrenia as well as a wide spectrum of psychotic and other severely disabling psychiatric diagnostic categories, but does not include degenerative brain disorder or a primary diagnosis of a developmental disability or of alcohol dependence.

Wis. Stat. § 54.01(30).

c. Definition of "Mental Illness" in a Protective Placement [§ 4.9]

Mental illness for the purpose of protective placement under Wis. Stat. ch. 55 means mental disease to the extent that a person requires care, treatment, or custody for his or her own welfare or the welfare of others or of the community. Wis. Stat. § 55.01(4m).

The legislature has adopted the same definition of "serious and persistent mental illness" for protective placements in Wis. Stat. § 55.01(6v) as for guardianships in Wis. Stat. § 54.01(30).

3. Necessity [§ 4.10]

a. In General [§ 4.11]

A crucial question needs to be asked by attorneys and judicial officials alike: "Is this guardianship really necessary?" A guardianship should not be pursued if there are less restrictive alternatives available to achieve the same or similar purpose. In some cases, less restrictive alternatives are not possible. For example, an individual might not have the capacity to execute a health-care power of attorney or a durable power of attorney for finances.

b. Less Restrictive Alternatives [§ 4.12]

(1) Health-Care Power of Attorney [§ 4.13]

The requirements for a health-care power of attorney are covered in Wis. Stat. ch. 155. Essentially, a person who is at least 18 years old and who is of sound mind may execute a power of attorney for health care designating another person to be their decision-maker if they are incapacitated. *See* Wis. Stat. § 155.05.

(2) Power of Attorney for Finances [§ 4.14]

The requirements for a power of attorney for finances and property are governed by Wis. Stat. ch. 244. The power of attorney for finances allows an individual or "principal" to grant the authority to another individual, an "agent" to act in the place of the "principal" for financial decisions. *See* Wis. Stat. § 244.02(9). The power of attorney for finances is "durable," meaning it is not terminated by the principal's incapacity unless the document provides otherwise. *See* Wis. Stat. §§ 244.02(3), 244.04. The power of attorney for finances becomes effective when executed unless the document provides it become effective upon the principal's incapacity. *See* Wis. Stat. § 244.09. The power of attorney for finances does not allow for gifting unless specifically stated in the document. *See* Wis. Stat. § 244.07(2).

(3) Supported Decision-Making Agreements [§ 4.15]

The scope and requirements of supported decision-making agreements are governed by Wis. Stat. ch. 52. An adult individual with a functional impairment may voluntarily enter into an agreement for assistance of a designated supportive adult to help with everyday life decisions including medical, psychological, financial, and educational decisions and those involving access to treatment records. The supporting assisting adult is not a surrogate decision-maker. The supporter cannot sign legal documents for the supported person, and the supporter cannot bind the supported person to a legal agreement. Wis. Stat. ch. 52.

(4) Conservatorship [§ 4.16]

Conservatorships are governed by Wis. Stat. § 54.76. Conservatorships are voluntary and do not "constitute evidence of the competency or incompetency of the individual." *See* Wis. Stat. § 54.76(5). That is, a person may benefit from a conservatorship even if no finding of legal incompetency has been or could be made.

"Any adult resident who is unwilling to or believes that he or she is unable to properly manage his or her assets or income may *voluntarily* apply to the circuit court of the county of his or her own residence for the appointment of a conservator of the estate." Wis. Stat. § 54.76(1) (emphasis added). A conservator has all the powers and duties of a guardian of the estate.

C. Habilitation Versus Rehabilitation [§ 4.17]

The Wisconsin Legislature set out the framework in Wis. Stat. chs. 51 and 55 as to which chapter can best meet a particular individual's condition. The Wisconsin courts give guidance as to how to apply the law to the individual's particular situation.

For a person to be a proper subject for a Wis. Stat. ch. 51 civil commitment, the person must be capable of rehabilitation, not merely habilitation. *Milwaukee Cnty. Combined Cmty. Servs. Bd. v. Athans (In re Athans)*, 107 Wis. 2d 331, 320 N.W.2d 30 (1982). In *Athans*, the court of appeals adopted a plain meaning of rehabilitation as active treatment to "ameliorate impairments and facilitate subject's capacity to function," whereas "habilitative services" are those "which assist an impaired person's ability to live in the community." *Id.* at 336 (citing U.S. Dep't of Health, Educ. & Welfare, *Health Planning Taxonomy* 4 (1979)).

In *Fond du Lac County v. Helen E.F. (In re Mental Commitment of Helen E.F.)*, 2012 WI 50, 340 Wis. 2d 500, 814 N.W.2d 179, the Wisconsin Supreme Court stated that the legislature set out specific strict rules, in Wis. Stat. chs. 51 and 55, that require counties to commit or place individuals according to the individual's particular situation. *Id.* ¶ 12. "Chapter 51 is designed to accommodate short-term commitment and treatment of mentally ill individuals, while Ch. 55 provides for long-term care for individuals with disabilities that are permanent or likely to be permanent." *Helen E.F.*, 2012 WI 50, ¶ 21, 340 Wis. 2d 500 (citing Wis. Stat. §§ 51.20(13)(g) (Wis. Stat. ch. 51 commitment is not to exceed 6 months; an extension of commitment can be up to 12 months), 51.20(1)(a) (the individual subject to commitment must be a proper subject for treatment), 55.08(1)(d) (Wis. Stat. ch. 55 placement allowed only for an individual suffering from a "disability that is permanent or likely to be permanent.").

Helen E.F. was an 85-year-old woman with Alzheimer's disease. When the action was brought, she had resided in a nursing home for six years and was exhibiting agitation and aggressive behaviors. She was detained pursuant to Wis. Stat. ch. 51 and placed on a behavioral health unit under an emergency detention. At a final commitment hearing a physician testified that although Alzheimer's disease is not a treatable mental disorder, the physician believed Helen E.F. to be a proper subject for treatment because her behaviors could be controlled with medication. Based on the physician's testimony, the circuit court involuntarily committed Helen E.F. for up to six months in a locked psychiatric unit. The court of appeals reversed, holding the primary purpose of Wis. Stat. ch. 51 is to provide treatment—something to which Alzheimer's disease does not respond.

In affirming the court of appeals, the Wisconsin Supreme Court relied on the test set out in *C.J. v. State (In re Mental Condition of C.J.)*, 120 Wis. 2d 355, 354 N.W.2d 219 (Ct. App.1984).

> If treatment will "maximize[] the[] individual functioning and maintenance" of the subject, but not "help[] in controlling or improving their disorder[]," then the subject individual does not have rehabilitative potential, and is not a proper subject for treatment. … However, if treatment will "go beyond controlling … activity" and will "go to controlling [the] disorder and its symptoms," then the subject individual has rehabilitative potential, and is a proper subject for treatment. *Id.* We believe the court of appeals' test accurately reflects the interests embodied in chs. 51 and 55.

Helen E.F., 2012 WI 50, ¶ 36, 340 Wis. 2d 500 (citing C.J., 120 Wis. 2d at 362).

However, in *Waukesha County v. J.W.J. (In re Mental Commitment of J.W.J.)*, 2017 WI 57, 375 Wis. 2d 542, 895 N.W.2d 783, the supreme court declined to find a distinction between "behaviors and symptoms," stating that this premise is invalid.

> The proper disjunctive categories in *Helen E.F.* are "activities" and "symptoms," and we can tell them apart. When we developed the framework for determining whether someone has rehabilitative potential we leaned heavily on *C.J.* The court of appeals in that case juxtaposed "habilitation" and "rehabilitation." The former relates to the control of activities:
>
> [H]abilitation is more closely related to daily living needs and skills than to treatment of a particular disorder. A practical definition of habilitation would include eating, dressing, hygiene, minimum social skills and such other things that facilitate personal maintenance and functioning. Habilitation is a concept frequently associated with the long-term care of the developmentally disabled. It is possible that controlling a person's activities by restricting his or her freedom and putting him or her on a carefully defined regimen would be part of a habilitation program.

Id. ¶ 31 (citing *C.J.*, 120 Wis. 2d at 359–60).

"Habilitation, therefore, refers to interventions that help a patient put exogenous things to his benefit (that is, activities). Rehabilitation, to the contrary, refers to improving the patient's condition through ameliorating endogenous factors such as symptoms and behaviors." *Id.* ¶ 36. The supreme court held that because the court was able to distinguish between activities and symptoms, it did not need to modify the *Helen E.F.* analysis. *Id.*

The court explained: "The policy of this State is to provide treatment in 'the least restrictive alternative appropriate to' a patient's needs." *Id.* ¶ 41 (citing Wis. Stat. § 51.001(1)). "If a treatment controls symptoms to such a degree that withdrawing it would subject the patient to a more restrictive treatment alternative, then the treatment controls enough symptoms to establish the patient has rehabilitative potential." *Id.* The court found that if treatment were withdrawn, J.W.J's condition would worsen to the point he would need inpatient treatment and with treatment he could live in the community.

III. Minor Guardianships [§ 4.18]

For a discussion of guardianship of the person of a child, see chapter 5, *infra*.

Wis. Stat. ch. 54 governs the appointment of a minor guardian of an estate. Because this chapter's focus is the intersection of mental health and guardianships, guardianships of the estate of a minor are beyond the scope of this chapter.

IV. Adult Guardianships [§ 4.19]

A. Statutory Authority [§ 4.20]

1. In General [§ 4.21]

Wis. Stat. § 54.10(3) governs the appointment of both guardians of the person and guardians of the estate for adults.

2. Burden of Proof [§ 4.22]

The burden of proof for the appointment of a guardian of the person or the estate is the clear and convincing evidence standard. *See* Wis. Stat. § 54.10(3). The burden of proof is on the petitioner, meaning the party asserting that an individual is mentally incompetent. *R.S. v. Milwaukee Cnty. (In re Guardianship of R.S.)*, 162 Wis. 2d 197, 470 N.W. 260 (1991).

3. Incompetency Standard [§ 4.23]

The elements for appointment of a guardian of the person and estate are set out in Wis. Stat. § 54.10(3)(a). They are the following:

- *Appointment of either a guardian of the person or the estate*. The person for whom guardianship is sought is at least 17 years and 9 months old.
- *Appointment of a guardian of the person*. "Because of an impairment, the individual is unable effectively to receive and evaluate information or to make or communicate decisions to such an extent that the individual is unable to meet the essential requirements for his or her physical health and safety."
- *Appointment of a guardian of the estate*. "[B]ecause of an impairment, the individual is unable effectively to receive and evaluate information or to make or communicate decisions related to management of his or her property or financial affairs, to the extent that any of the following applies:

a. The individual has property that will be dissipated in whole or in part;
b. The individual is unable to provide for his or her support;
c. The individual is unable to prevent financial exploitation."

- *Appointment of either a guardian of the person or the estate*. "The individual's need for assistance in decision making or communication is unable to be met effectively and less restrictively through appropriate and reasonably available training, education, support services, health care, assistive devices, a supported decision-making agreement under [Wis. Stat.] ch. 52, or other means that the individual will accept."

A court's determination that the individual is in need of a guardian of a person or the estate or both "may not be based on mere old age, eccentricity, poor judgment, physical disability, or the existence of a supported decision-making agreement." Wis. Stat. § 54.10(3)(b). The court must consider a number of factors in the appointment of a guardian, a nonexhaustive list of which is set forth in Wis. Stat. § 54.10(3)(c).

4. Expert Opinion [§ 4.24]

Wis. Stat. § 54.36 sets forth the requirement for an examination of the proposed ward of a guardianship by a mental health expert. "[A] physician or psychologist, or both, shall examine the proposed ward and furnish a written report stating the physician's or psychologist's professional opinion regarding the presence and likely duration of any medical or other condition causing the proposed ward to have incapacity…." The examiner must use a mandatory Wisconsin circuit court form, Form GN-3130, (Examining Physician's or Psychologist's Report). (All circuit court forms are available at Wis. Ct. Sys., *Circuit Court Forms*, https://www.wicourts.gov/forms1/circuit/index.htm (last updated Apr. 20, 2021).)

This form requires specification of the reason for the individual's incapacity, whether it be a developmental disability, degenerative brain disorder, serious and persistent mental illness, or other like incapacities. The examiner can indicate by checking boxes on the form the individual's rights proposed to be removed and the powers proposed to be transferred.

B. Chapter 51 Conversions to Chapter 54 Guardianships and Criminal Conversions [§ 4.25]

1. In General [§ 4.26]

In some instances, an individual who is the subject of a commitment or, in other instances, a person charged with a crime, may have the case converted to a guardianship.

2. Chapter 51 Conversion under Wis. Stat. §§ 51.20(7)(d)1. and 51.67 [§ 4.27]

If a court determines, after testimony from a psychiatrist or a psychologist at a probable cause hearing, that the individual is a "fit subject" for guardianship and protective placement or services under Wis. Stat. ch. 55, the court may appoint a temporary guardian for the individual. This may be done without notice. The temporary guardianship can last for no more than 30 days.

If a person's diagnosed mental illness is no longer treatable or made better with medication or treatment, the court may convert the Wis. Stat. ch. 51 case into a Wis. Stat. ch. 54 and 55 temporary guardianship and protective placement. If a hearing for permanent guardianship and protective placement is not heard within the 30-day time limit, the court loses competency to proceed. There is no mechanism in the statutes to extend the time limits. "Once probable cause for the temporary emergency detention is established, the statute then requires that a final hearing on the merits of the petition be held, and the proceedings brought to conclusion, within thirty days." *State ex rel. Sandra D. v. Getto (In re Guardianship & Protective Placement of Sandra D.)*, 175 Wis. 2d 490, 501, 498 N.W.2d 892 (Ct. App. 1993).

3. Criminal Conversion under Wis. Stat. § 971.14 [§ 4.28]

Competency proceedings in criminal actions are governed by Wis. Stat. § 971.14. Such proceedings are fully outlined in 1 *Wisconsin Judicial Benchbook—Criminal and Traffic* ch. CR 12 (State Bar of Wis. 6th ed. 2019 & Supp.). After the issue of a criminal defendant's competency has been raised and a court finds that a defendant is not competent and not likely to regain competency within strict statutory timelines, the court may order that the defendant be "taken immediately into custody by a law enforcement official and promptly delivered to a facility specified in [Wis. Stat. §] 51.15(2) (d)." Thereafter, a civil commitment or protective placement proceeding may be commenced pursuant to Wis. Stat. § 51.15 (civil commitment) or 55.135 (protective placement). Wis. Stat § 971.14(6)(a).

V. Temporary Guardianships [§ 4.29]

A. In General [§[§ 4.30]

In certain situations, there might not be sufficient time to conduct a full-blown guardianship proceeding entailing the filing of a petition, examination, and reporting and presenting testimony, but the need for a guardian for immediate assistance is clear. A congested court calendar might make impossible the scheduling of proceedings within time limits, or emergency medical decisions might need to be made immediately, or the proposed ward might be vulnerable to imminent financial exploitation. Or, perhaps, a pandemic makes it impossible for parties to convene to meet statutory time limits. In such cases, a temporary guardianship may be appropriate.

An individual who has a temporary guardian might not need a permanent guardian. An individual who has a mental health diagnosis and is having acute symptoms as a result of not taking psychotropic medications might need a life-saving procedure, but an evaluating psychologist might have opined that the individual does not have the capacity to understand the risks and benefits of the procedure. This individual might need a temporary guardian to make the decision on life-saving procedure but might not need a permanent guardian after the individual resumes taking medications and has reached his or her functional baseline.

B. Statutory Authority: Wis. Stat. § 54.50 [§ 4.31]

1. Burden of Proof [§ 4.32]

There must be a "reasonable likelihood" that the proposed ward is incompetent.

2. Incompetency Standard [§ 4.33]

The standard for incompetency in a temporary guardianship is that "a proposed ward's particular situation … requires the immediate appointment of a temporary guardian of the person or the estate." Wis. Stat. § 54.50(1).

3. Expert Testimony [§ 4.34]

"At the hearing, the petitioner shall provide a report or testimony from a physician or psychologist that there is a reasonable likelihood that the proposed ward is in competent." Wis. Stat. § 54.50(3)(c).

4. Duration [§ 4.35]

The court can appoint a temporary guardian of the person, the estate, or both for a period not to exceed 60 days. The court can extend the temporary guardianship for one additional 60-day period for good cause shown. The court cannot extend the time limits any further. The court must wait 90 days after the expiration of the original temporary guardianship or extension to grant an additional temporary guardianship. *See* Wis. Stat. § 54.50.

5. Guardian ad Litem [§ 4.36]

A guardian ad litem must be appointed and report the advisability of the temporary guardianship to the court. Wis. Stat § 54.50(3)(b)

6. Rehearing [§ 4.37]

Parties have a right to rehearing on the issue of appointment of temporary guardian. Wis. Stat. § 54.50(3)(d)

VI. Guardianship of the Person [§ 4.38]

A. Qualifications [§ 4.39]

Wis. Stat. § 54.15 addresses all the things a court "shall" consider in the appointment of a guardian. When appointing a guardian, the court must consider the opinion of the ward and the ward's family, potential conflicts of interest, who the agents are under the individual's health-care and financial powers of attorney (if any) and whether it may be appropriate to appoint a corporate guardian, and the statement

of acts by the proposed guardian. *See* Wis Stat. 54.15 The proposed guardian must file a Statement of Acts/Consent to Serve with the court at least 96 hours before the court hearing. Form GN-3140 (Statement of Acts by Proposed Guardian and Consent to Serve as Guardian (Adult Guardianship)). This form has a series of questions, the answers to which can inform the court and the other parties as to the proposed guardian's suitability and background. The form also requires the proposed guardian to acknowledge the duties and responsibilities of a guardian. The court has discretion to appoint a proposed guardian who does not have a "perfect" statement of acts. For instance, the proposed guardian might have an old criminal conviction or a bankruptcy but still be considered suitable.

B. Responsibilities and Duties [§ 4.40]

Wis. Stat. § 54.18 covers the duties, powers, and limitations of a guardian. The ward retains all rights not assigned to the guardian or limited by statute. *See* Wis. Stat. § 54.18(1). The powers transferred to the guardian should constitute the least amount of intervention and only those powers necessary for the personal needs and property management of the ward. *See id.* The guardian must act in good faith when acting on behalf of the ward in a manner that an "ordinarily prudent person" exercises in his or her own affairs. *See* Wis. Stat. § 54.18(2)(a).

The guardian must not lend funds to himself or herself, lend funds to another individual or entity without court approval, or purchase property of the ward without court approval. *See* Wis. Stat. § 54.18(3). Finally, a guardian of the person or the estate is immune from liability if the guardian "performs the duties in good faith, in the best interests of the ward, and with the degree of diligence and prudence that an ordinarily prudent person exercises in his or her own affairs." *See* Wis. Stat. § 54.18(4).

VII. Guardianship of the Estate [§ 4.41]

A. Qualifications [§ 4.42]

Wis. Stat. § 54.15 sets forth the factors to be considered by a court in appointing a guardian. *See supra* § 4.39.

B. Responsibilities and Duties [§ 4.43]

The duties of a guardian of an estate are governed by Wis. Stat. § 54.19, and the powers of the guardian of the estate are governed by Wis. Stat. § 54.20.

The emphasis in Wis. Stat. § 54.19 is that guardians of the estate, in carrying out their duties, are to do so in a manner "to provide a ward with the greatest amount of independence and self-determination with respect to property management in light of the ward's functional level, understanding, and appreciation of his or her functional limitations and the ward's personal wishes and preferences with regard to managing the activities of daily living." The guardian of the estate must take possession of the all assets of the ward, inventory the assets, and use the assets for the ward's benefit. *See* Wis. Stat. § 54.19. An annual account must be filed to demonstrate the use of the ward's funds for the benefit of the ward. *See* Wis. Stat. §§ 54.19(5), 54.62.

Wis. Stat. § 54.20 emphasizes the fiduciary duty that the guardian has to the ward and that the guardian is to use the least restrictive form of intervention for the ward. *See* Wis. Stat. § 54.20(1).

Wis. Stat. § 54.20(2) lists the powers that require court approval before the guardian exercises the powers. Examples of powers that require court approval include, but are not limited to, making gifts; transferring assets to an existing revocable needs trust; establishing a special needs trust; purchasing annuity or insurance contracts; electing options or changing beneficiaries under insurance or annuity contracts; surrendering policies for their cash value; ascertaining, establishing, and exercising rights under a retirement plan or account; and establishing marital property rights. *See* Wis. Stat. § 54.20(2)(a)–(k).

VIII. Contested Versus Uncontested Guardianship § 4.44]

A. Uncontested [§ 4.45]

The requirements of a guardianship hearing are set out in Wis. Stat. § 54.44. These requirements include, but are not limited to time limits, standard of proof, presence of the ward, privacy of the hearing, participation of interested parties and unsuitability of the guardian. *See id*. The rights of the proposed ward are governed by Wis. Stat. § 54.42. These rights include, but are not limited to the right to counsel, the right to a jury trial, the right to an independent examination, the right to be present at the hearing, and the right to have the hearing in an accessible location. *See id*.

The parties in an uncontested guardianship are generally the petitioner, the petitioner's attorney, the proposed ward, the guardian ad litem, the proposed ward's adversary counsel, the proposed guardian, and perhaps interested persons such as family members, corporation counsel, or the named agent in a health-care or financial power of attorney.

Note. The right to adversary counsel, the duties of adversary counsel, and who appoints counsel are set out in Wis. Stat. § 54.42(1)(a)–(c).

The guardian ad litem should advise the court whether the subject's appearance is waived. Adversary counsel, if any, should also address the issue of waiver of their client's appearance. The parties should indicate, preferably in writing, whether they are stipulating to the admission of the competency evaluation.

Testimony should be elicited from the petitioner by the petitioner's attorney to establish the necessity for the guardianship. The petitioner should provide brief testimony regarding the reasons the guardianship was filed and specify the rights sought to be removed and the powers sought to be transferred.

If a health-care power of attorney or financial power of attorney is in place, testimony should be elicited to establish the reasons a guardianship is needed. Potential reasons include, but are not limited to, situations in which the agent is deceased, incapacitated, unable to be located, or otherwise not acting. In other instances, the advanced planning document itself might be invalid.

Testimony also should be provided to establish the proposed ward's financial situation. Questions may be posed to address practical real-life examples about the proposed ward's capabilities and incapacities, such as the following:

- If the proposed ward were dropped off at the courthouse, would the individual be able to return home?
- Would the individual be able to self-administer 2 types of medications twice per day for the next 10 days?
- Is the individual able to schedule health-care appointments?
- If the individual were sent into a store with $10 and told to buy a gallon of milk, would the individual be able to accomplish the task and get correct change?
- Is the individual able to pay bills without assistance?

Adversary counsel and the guardian ad litem should be given a chance to cross-examine the petitioner. The guardian ad litem gives an opinion on whether the guardianship is in the best interest of the proposed ward. The guardian ad litem also should have filed a written report addressing their position on the rights to be removed from the individual and the powers to be transferred to the guardian. Adversary counsel should indicate the proposed ward's position.

The proposed guardian should state their willingness to be the guardian and acknowledge an understanding of their duties and responsibilities.

The disposition of the petition is governed by Wis. Stat. § 54.46. The court will make findings by clear and convincing evidence as to the reasons for the guardianship (severe and persistent mental illness); the rights removed; the powers transferred; and the appointment of the guardian of the person, the estate, or both. The court will read the firearms warnings to the ward and will remind the guardian of the guardian's future responsibilities and duties. For guardians of the person, those duties include the obligation to file an annual report on the condition of the ward. For guardians of the estate, the duties include the obligation to file an inventory and an annual accounting.

B. Contested Guardianship Hearings [§ 4.46]

Though most contested guardianship hearings are decided by a judge, the proposed ward has the right to a jury trial. See Wis. Stat § 54.42.The parties in a contested guardianship are generally the petitioner, the petitioner's attorney, the proposed ward, the guardian ad litem, the proposed ward's adversary counsel, the proposed guardian, and perhaps interested persons such as family members who appear, corporation counsel, or the named agent in a health-care or financial power of attorney.

In some instances, the proposed ward objects to a guardianship as unnecessary. In others, a proposed ward might concede the need for a guardianship but object to the proposed guardian. In still other cases, the proposed ward might agree a guardian is needed but object to the specific rights proposed to be removed or the powers proposed to be transferred. Finally, in some other cases, another interested person (such as a family member or corporation counsel) believes the proposed guardian is unsuitable. A person who is the named agent for a health-care or financial power of attorney may contest the necessity of a guardianship.

In contested guardianship cases, the petitioner will provide testimony regarding the reasons the guardianship is being sought. Questions like those set forth in section 4.45, *supra*, regarding uncontested guardianship hearings, are often used to elicit the relevant evidence regarding the proposed ward's capabilities and incapacities. Open-ended questions that may be useful include the following:

- Why does the individual need a guardian?
- If there was a fire in the individual's home, would the individual know how to call 9-1-1?
- Can the individual make health-care appointments?
- Does the individual know how to obtain medications (e.g., arrange for picking up filled prescriptions, order refills)?
- Does the individual know how to apply for public benefits?
- Does the individual know how to pay bills?

The petitioning attorney will have to present testimony from a physician or psychologist as to the proposed ward's capacity or competency. The competency expert should be asked questions to elicit the proposed ward's diagnosis, the amount of time the expert spent with the proposed ward, and the type of testing conducted and relied on to reach the expert's conclusions. The competency expert also should be asked whether the proposed ward has the capacity to exercise the rights or retain the powers proposed to be removed.

In lieu of a physician's testimony, all parties may agree to the admission of the written competency evaluation pursuant to Wis. Stat. § 54.36. It is preferable that such an agreement be reduced to a written stipulation.

Adversary counsel for the ward and the guardian ad litem will have an opportunity to cross-examine the petitioner and the expert (whether a physician or a psychologist). Typical areas of inquiry might include questions to establish the proposed ward's orientation to time, date, and season or to establish the proposed ward's awareness of current events and identities of persons such as the president of the United States or the governor of the state.

The guardian ad litem and adversary counsel can each call witnesses. Adversary counsel can request an independent evaluation pursuant to Wis. Stat. § 54.42(3) and call their own expert as to the competency of the proposed ward. The ward may testify on their own behalf and is subject to cross-examination from the petitioning attorney and the guardian ad litem. The guardian ad litem should make a recommendation regarding the proposed ward's best interest. The petitioner's attorney (or the petitioner if self-represented), the guardian ad litem, and adversary counsel should each give argument as to whether the burden of proof has been met, who the guardian should be, and which rights should be transferred and powers removed. The court can grant or deny the guardianship. The court may grant the guardianship but appoint an alternative guardian (such as a corporate guardian) whom the court believes is more suitable. The court may also grant the guardianship but decide to allow the individual to retain certain rights and powers. The disposition of the petition is governed by Wis. Stat § 54.46.

IX.
Protective Placement and Protective Services [§ 4.47]

A. Protective Placement [§ 4.48]

1. In General [§ 4.49]

Orders for protective placement must be made when the individual resides in a facility licensed for 16 or more beds. Wis. Stat. § 55.055(2)(b). *Facility* is defined as a group home, a foster home, a community-based residential facility, or an adult family home. Wis. Stat. § 55.055(2)(a). In addition to the above-named facilities, protective placement may be made to public medical institutions and centers for persons with developmental disabilities but cannot be made to units for persons with acute mental illnesses. Wis. Stat. § 55.12. Protective placement "shall be provided in the least restrictive manner consistent with the needs of the individual to be protected and with the resources of the county department." Wis. Stat. § 55.12(3).

Counties are required to make an affirmative showing of a good-faith reasonable effort to find and fund an appropriate placement. *Dunn Cnty. v. Judy K. (In re Guardianship of Judy K.)*, 2002 WI 87, 254 Wis. 2d 383, 647 N.W.2d 799 (analyzing former Wis. Stat. § 55.06(9)(a), which is now Wis. Stat. § 55.12(1)). If the court believes a more restrictive placement might be needed in the future, the court can, as a prophylactic measure, order protective placement for an individual already residing in a family home, an adult family home, or a group home with fewer than 16 beds.

2. Definition [§ 4.50]

Protective placement means a placement that is made to provide for the care and custody of an individual. Wis. Stat. § 55.01(6). Not every individual who has been adjudicated incompetent needs a protective placement.

3. Standard for Protective Placement [§ 4.51]

Four elements must be established before protective placement may be ordered. Specifically, the individual to be protected must

1. Have "a primary need for residential care and custody";
2. Be "an adult who has been determined to be incompetent by a circuit court";
3. Be "so totally incapable of providing for … her own care or custody as to create a substantial risk of serious harm to … herself" because of "a developmental disability, degenerative brain disorder, serious and persistent mental illness, or other like incapacit[y]"; and
4. Have "a disability that is permanent or likely to be permanent."

Wis. Stat. § 55.08(1)(a)–(d); *Fond du Lac Cnty. v. Helen E.F. (In re Mental Commitment of Helen E.F.)*, 2012 WI 50, 340 Wis. 2d 500, 814 N.W.2d 179.

4. Comprehensive Evaluation [§ 4.52]

A comprehensive evaluation is required before a court can order protective placement or protective services. This evaluation is completed by a county department or an agency with which the department contracts and should include recommendations for the individual's placement. Wis. Stat. § 55.11.

5. Burden of Proof [§ 4.53]

The standards of Wis. Stat § 55.08(1) must be proved by clear and convincing evidence. Wis. Stat. § 55.10(4)(d).

6. Jury Trial [§ 4.54]

The individual who is alleged to need protective placement has the right to a jury trial. Wis. Stat. § 55.10(4)(c).

7. Emergency Protective Placement [§ 4.55]

As set forth below, emergency and temporary protective placements are governed by Wis. Stat. § 55.135.

An individual may be detained if

> it appears probable that an individual is so totally incapable of providing for his or her own care or custody so as to create a substantial risk of serious physical harm to himself or herself or others as a result of developmental disability, degenerative brain disorder, serious and persistent mental illness, or other like incapacities if not immediately placed….

Wis. Stat. § 55.135(1).

A preliminary hearing must be held within 72 hours after the time of the individual's detention, excluding Saturdays, Sundays, and legal holidays. The petitioner must prove there is probable cause to believe the grounds for protective placement under Wis. Stat. § 55.08(1). Wis. Stat. § 55.135(4).

A guardian ad litem is appointed for the individual who is detained. The individual also has the right to an attorney appointed at public expense. If the court finds probable cause, the court may order temporary protective placement for up to 30 days, pending a permanent hearing.

The final hearing must be held within 30 days after the probable cause hearing, and failure to do so causes the court to lose competency to proceed. *N.N. v. County of Dane (In re Guardianship of N.N.)*, 140 Wis. 2d 64, 409 N.W.2d 388 (Ct. App. 1987). There are no mechanisms in the statute that allow for an extension of time.

8. *Watts* Reviews (Annual Review of Protective Placement) [§ 4.56]

Pursuant to Wis. Stat § 55.18, which is a codification of *State ex rel. Watts v. Combined Community Services Board*, 122 Wis. 2d 65, 362 N.W.2d 104 (1985), every individual who is subject to a protective placement has a review, which includes a report by the county, a guardian ad litem appointment and report, a court review of reports, a hearing, and an order. The purpose is to ensure the individual who is protectively placed is in the least restrictive setting commensurate with the individual's needs.

The individual has the right to adversary counsel, an independent examination, and a due-process hearing.

9. Court-Ordered Medications [§ 4.57]

A guardian cannot force the ward to take psychotropic medication absent a court order. Involuntary administration of psychotropic medications is governed by Wis. Stat. § 55.14. A petition for the involuntary administration of psychotropic medications must include a written statement by a physician with personal knowledge of the individual's current condition and specific data that the condition necessitates the administration of psychotropic medication.

In addition, a hearing is required, a guardian ad litem must be appointed, and adversary counsel must be appointed. The individual has the right to an independent medical or psychological examination. The petition must be heard within 30 days after it is filed. There also must be an annual review of the involuntary administration of the medication so that it is not a lifetime order.

The review of the involuntary medication order is pursuant to Wis. Stat § 55.19. As in the case of an annual review of placement, the county files a report, a guardian ad litem is appointed and files a report, and the court reviews the reports and conducts a hearing. The individual has a right to an attorney, an evaluation, and a due-process hearing.

B. Protective Services [§ 4.58]

1. In General [§ 4.59]

Protective services may be ordered in the absence of a protective placement. Like protective placement, protective services are to be provided in the least restrictive manner consistent with the needs of the individual and the resources of the county department. The frequency of services being used without a corresponding order for protective placement varies among Wisconsin counties.

2. Definition [§ 4.60]

Protective services are defined as follows:

(a) Outreach.
(b) Identification of individuals in need of services.
(c) Counseling and referral for services.
(d) Coordination of services for individuals.
(e) Tracking and follow-up.
(f) Social services.
(g) Case management.
(h) Legal counseling or referral.
(i) Guardianship referral.
(j) Diagnostic evaluation.
(k) Any services that, when provided to an individual with developmental disabilities, degenerative brain disorder, serious and persistent mental illness, or other like incapacity, keep the individual safe from abuse, financial exploitation, neglect, or self-neglect or prevent the individual from experiencing deterioration or from inflicting harm on himself or herself or another person.

Wis. Stat. § 55.01(6r).

3. Standard [§ 4.61]

The individual must be adjudicated incompetent and "as result of developmental disability, degenerative brain disorder, serious and persistent mental illness, or other like incapacities, the individual will incur a substantial risk of physical harm or deterioration or will present a substantial risk of physical harm to others if protective services are not provided." Wis. Stat. § 55.08(2)(a), (b).

4. Comprehensive Evaluation [§ 4.62]

A comprehensive evaluation is required before a court orders protective placement or protective services. This evaluation should be completed by a county department or an agency with which the department contracts and should include recommendations for the individual's placement. Wis. Stat. § 55.11.

5. Burden of Proof [§ 4.63]

The standards of Wis. Stat. § 55.08(1) must be proved by clear and convincing evidence. Wis. Stat. § 55.10(4)(d).

X. Treatment Concerns [§ 4.64]

A. Societal Norms Versus Self-Determination [§ 4.65]

An individual who has the capacity to make decisions has the right to make those decisions even though the court or family members do not agree with the wisdom of those decisions. The purpose of a guardianship is to put a decision-maker in place when an individual lacks capacity to make decisions, not to put in place a substitute decision-maker who makes decisions that meet societal norms. The decisions being made by the individual might be decisions that the majority of society believes to be imprudent. A court should not order a substitute decision-maker only on the basis that an individual is making "bad" decisions and a guardian will make "better" decisions.

B. Modification or Termination of Guardianships [§ 4.66]

When a court grants a petition for guardianship, it makes findings that the individual is incompetent as a result of a condition or impairment that is permanent or likely to be permanent. There are circumstances in which an individual who has been adjudicated incompetent improves enough to regain some rights and powers or improves to the extent that the individual no longer needs a guardian. Review and modification of guardianships is covered in Wis. Stat. § 54.64(2)–(4). If a petition is filed to review incompetency of the ward, a guardian ad litem must be appointed, a hearing scheduled, and interested persons provided with notice. Wis. Stat. § 54.64. The ward has the right to counsel and the right to a jury trial. The court may terminate or modify the guardianship including restoration of rights and powers based on the evidence.

C. Modification of Protective Placement or Protective Services [§ 4.67]

Modification of a protective placement order can be done at the time of the annual review or *Watts*-review process. The procedures and requirements to modify protective placement or protective services are beyond the scope of this chapter. They appear at Wis. Stat. § 55.16.

XI. Conclusion [§ 4.68]

When considering a guardianship, attorneys and courts must be cognizant of the permanency of a guardianship and the ramifications of the removal of rights from an individual and the transfer of the decision-making powers of an individual to a guardian. A guardianship of an adult is permanent unless it is modified or terminated by a court.

Though an individual's mental illness diagnosis is a chronic condition, the inquiry must be made: Can this condition be "made better" by therapies and medication? Even without medication and therapies, is the individual with the mental illness capable of making their own decisions? Can the individual understand the risk and benefits of a procedure? Can the individual pay their own bills? Can they make their own appointments? Can the individual do these things with some assistance short of a guardianship?

Before a permanent guardianship is filed regarding an individual who has a mental health diagnosis, there must be a competency evaluation that opines that even when the individual is medication compliant, the individual is not competent to make decisions. The mental illness must be severe and persistent.

One must consider a situation of a young person with a first "break" or onset of a mental illness. This situation causes great distress and fear for the individual and their family. The family seeks advice to pursue a guardianship. The family may want to protect that young individual. The onset of the mental illness alone does not necessitate a guardianship. The mental illness must be severe and persistent, and to pursue a guardianship there must be a doctor's report to verify the need for a permanent guardian.

Chapter 5
Representing Youth with Mental Health Issues

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Note. The authors have chosen to use gender-neutral pronouns (e.g., "they," "them," "their") in the writing of this chapter. Mental health issues affect people regardless of sex or gender identity.

I. General Overview [§ 5.1]

Society does not always include youth when discussing mental health concerns, but youth do experience mental health issues. Each year, about 1 in 5 youth experience a mental health disorder; this amounts to approximately 279,000 Wisconsin youth experiencing some sort of mental health issue on a yearly basis, a number somewhat larger than the entire population of the city of Madison, Wisconsin. Wis. Office of Children's Mental Health, *2019 Annual Report to the Wisconsin Legislature*, https://children.wi.gov/Documents/2019%20OCMH%20Annual%20Report.pdf. Representing youth with mental health disorders involves a special skill set and knowledge of the law and how it can differ when applied to youth. This chapter covers practical aspects of representing youth with mental health issues and various aspects of civil and criminal law that affect youth with mental health issues, with a special focus on Wisconsin state law. [4]

Note. The authors of this chapter use the terms "youth" and "child" to refer to individuals under the age of 18. The term "juvenile" is used specifically in the context of Wis. Stat. ch. 938 statutory language.

II. Attorney-Client Relationship [§ 5.2]

A. In General [§ 5.3]

One of the basic foundations of the current legal system is the privileged nature of the attorney-client relationship. Wis. Stat. § 905.03. The idea seems simple enough on its face: Clients are able to enter into contracts with attorneys who are then responsible for maintaining the confidential information disclosed. Questions arise, however, when the client is less traditional. Clients who are unable to enter into contracts, such as minors, might leave attorneys and others in the case with questions about how the privileged relationship is maintained or how it plays out in reality for attorneys with minors as clients.

While the statutory definition of a client does not exclude minors, the statute also provides little guidance on when a minor is the privilege holder, as opposed to the minor's guardian on their behalf. Wis. Stat. § 905.03(3) (stating that the "privilege may be claimed by the client, the client's guardian or conservator"). Without explicit statutory support, attorneys may use other related statutes as a guide for when a minor may direct representation and take control of claiming privilege. Specifically, referring to statutory provisions that allow for a minor to have adversary counsel, rather than guardians ad litem, provides some differentiation between minors based on age and capacity. *See infra* § 5.13 (JIPS and delinquency proceedings when the client has mental illness).

B. Privilege Holder [§ 5.4]

One similarity remains regardless of the client's age and mental state: The privilege belongs to the client. There is no exception enumerated in the statute for when a client is a minor, though the statute does provide that it may be claimed by the client's guardian. *See* Wis. Stat. § 905.03(3), (4). By allowing a client's guardian or conservator to claim privilege on the client's behalf, the law clearly allows that not all clients are directly able to claim privilege, which can reasonably extend to minors.

Privilege likely extends to communication between the attorney and parent or guardian of the minor client if the communication is clearly necessary to transmit privileged communications. Whether communication is clearly necessary requires attorneys to consider the age and capacity of the client; little dispute is likely when a client is very young or has documented disabilities that prevent their understanding of the legal process. For older minors, those in their teenage years without disabilities or delays that impede understanding, attorneys are best served in having releases allowing the communication with the parent to make sure the minor client understands the information that will be released to the parent. Attorneys should keep in mind that minor clients might have opinions on the case and representation, which are entitled to weight in the legal proceedings. How much weight requires assessing the client's understanding of the process and consequences, including considering the client's age and mental capacity.

C. Representation Agreements [§ 5.5]

The initial assessment of the client's ability to be an active part of the case, and claim or waive privilege in the future, should be considered when the attorney enters into representation of the client. Some minors might be the appropriate signer of the contract while others are too young or require representation by a parent or guardian based on mental capacity. For clients who want to be actively involved in the representation but also have their parent or guardian as a decision-maker, attorneys may want both the client and the parent or guardian to sign onto the representation and lay out in a secondary agreement who has the final word on the direction of litigation and a process for if the minor and parent or guardian disagree, especially as it relates to claiming privilege and releasing information. If the client is a minor, considering the minor's wishes and taking the time to understand the minor's perspective may reduce their trauma in the related legal proceedings because it promotes personal agency and transparency in a process that is frequently scary and uncertain for those without legal training, regardless of age.

D. Practical Tips [§ 5.6]

Working with minors can be uniquely challenging for attorneys, especially if the attorney's typical client is a competent adult or corporation. The challenges include communicating with the client, meeting with the client, and ensuring client understanding.

When working with minors, especially those with mental health challenges, ensuring consistent communication preferences is important. Minors may have personal cell phones, which allow access to calls, texts, and emails all on one convenient device, but minors may also be limited in accessing the device. If a minor provides a cell phone number as the primary contact, attorneys should also get a backup phone number, such as a parent's or guardian's number, whenever possible in case the phone privilege is used as a discipline tool or it is lost or otherwise unavailable. If a secondary number is not the client's individual contact number, attorneys should obtain a signed release outlining which information can be left in a voicemail or with another person who answers the phone. Communication issues may also arise during the school year when a minor may be unable to answer the phone during regular business hours.

Minor clients may prefer to avoid a telephone call, whether because of comfort, convenience, or concerns of being overheard. Attorneys should be wary, however, of communication through texting and apps (such as Facebook Messenger, WhatsApp, or Snapchat) much the same as with adult clients. Before agreeing to use an app, attorneys should check the company's privacy policies and learn who potentially can access information transmitted on the app. Many messenger services, especially free apps, are not secure and are therefore not appropriate for client communication, despite client preferences. If the client prefers text messages through the cell phone provider, attorneys should discuss with the client the importance of preventing friends and others who are not covered by privilege from viewing the confidential information. If attorneys are unsure if that is feasible or whether the client understands the need for discretion, they may wish to simply limit what is said in a text message.

Email is relatively more secure than texting and apps, but it is not without its own challenges, regardless of the client's age or capacity. Attorneys should check with the email provider before agreeing to use email as a regular communication tool. Similar to a work email address for an adult, a school email address might not be private and secure. School districts might provide email for students, but they might also monitor school devices on which the account is accessed or have other policies in place that allow school employees to access student email. If so, there is no reasonable expectation of privacy in the communication, and privilege might be inadvertently forfeited.

> ***Caution.*** A privilege might be inadvertently forfeited if information is accidentally disclosed. The privilege is not forfeited if the disclosure is inadvertent, the privilege holder took reasonable steps to prevent disclosure, and the holder took prompt and reasonable steps to rectify the disclosure. Use of electronic communication that is known to allow access by other individuals or entities may mean that the second requirement—preventing disclosure—is not met and the privilege is thereby forfeited. Wis. Stat. § 905.03(5).

As a practical matter, if the email account is secure and has a calendar function, attorneys may wish to send clients calendar invitations for meetings, court hearings, or other important dates to assist clients in remembering where and when they are expected.

Attorneys working with minors, especially when the minor's mental health is an issue in the case, should be cognizant of problems that could arise with in-person attorney-client meetings. Attorneys should consider the client's age and circumstances, as well as the client's wishes, in setting in-person meetings to best serve the client's needs. For teenage clients, particularly, attorneys may be best served in meeting with the client without a parent or guardian present, at least briefly, to confirm if the minor wants the parent or guardian to be present and involved in the representation. Attorneys may want to have support staff or an assistant attend meetings in some circumstances to appease parent or guardian concerns if the attorney will be meeting with a minor outside the parent's or guardian's presence.

Representing minors can be challenging but also provides an opportunity for attorneys to assess how well the clients communicate with people who are not lawyers and make sure that the client is an engaged part of the legal process. When working with minors and those with mental health concerns, attorneys should begin assessing the client's understanding of the process early on. If possible, obtaining a recent report card or assessment from the school or information about education supports may assist in this determination. Knowing how a minor performs in reading or writing courses in school may offer some insight into the client's ability to understand the process and written documentation, including the representation agreement and releases of information. Attorneys should consider the minor's reading level when drafting written communication and utilize tools available in many software programs to assess the reading level of such documents. Attorneys can also use visual tools, such as highlighting and underlining, to help minors focus on the most important information in a document. This strategy is particularly helpful if there is a date or location the client needs to remember.

Once an attorney has a basic idea of the client's capacity to interpret and comprehend written and oral communications, attorneys should become familiar with the client's communication styles. Asking the client to explain the situation or restate information covered in a meeting may assist in setting terminology for future meetings. Developing shared terminology will assist in making sure that the client actually understands what is going on rather than simply agreeing with words that have no meaning for them. Shared terminology may mean learning the slang terms the client uses so the attorney can help connect the slang to the legal terms or helping the client to learn new ideas and connect them with the lawyer's language.

Minors and those with mental health challenges might have trouble picturing the court process, no matter the communication efforts made by the attorney. Attorneys may consider reaching out to court staff to schedule a time to take a minor client through the actual courtroom they will appear in if that will be a part of the case. Visualizing the space and seeing the room may assist the minor in being more comfortable with the logistics of the case so that part might be less confusing or traumatizing. Taking the meeting out of a conference room or off the phone may assist the client in analyzing the process and is a good opportunity for some role playing to assist in understanding.

The key to effectively creating and protecting the attorney-client relationship when the client is a minor, especially when mental health concerns exist with the client, is clear communication. Taking the time early on to establish understanding of terms, the legal process, and communication preferences will ensure that the client is represented the most effectively as the case progresses.

III. Civil Commitments of Minors [§ 5.7]

Minors in Wisconsin may, in certain circumstances, be unable to remain in their homes and require civil commitment. A civil commitment is the process for the state to restrict an individual's liberty on the basis that the individual requires treatment or care for specific mental health, development disability, or substance dependency issues. The goal of such commitments is to protect the individual or others from harm. Steve McCarthy, Wis. Legis. Council, Issue Brief, *Civil Commitment* (Oct. 2019), https://docs.legis.wisconsin.gov/misc/lc/issue_briefs/2019/health_and_mental_health/ib_civilcommit_sm_2019_10_01.

Wis. Stat. ch. 51 provides the guidance for voluntary and involuntary commitments, including treatment and rehabilitation of adults and children with mental illness, developmental disabilities, or alcohol and other drug abuse or dependencies. An involuntary civil commitment for adults and children requires certain elements: imminent dangerousness based on acts that the person is committing that will likely lead to self-harm or harm to others; the dangerousness is believed to be caused by a mental illness; and there exists a substantial probability that death, serious physical injury, debilitation, or disease will imminently ensue unless the person receives prompt adequate treatment. Wis. Stat. § 51.20(1)(a). The individual in question must be mentally ill, developmentally disabled, or drug dependent, capable of rehabilitation, and dangerous as defined by statute. *Id.*

Note. A proper subject for treatment must mean there are techniques that can be employed to bring about rehabilitation from the condition. *Fond du Lac Cnty. v. Helen E.F. (In re Mental Commitment of Helen E.F.)*, 2012 WI 50, 340 Wis. 2d 500, 814 N.W.2d 179.

A minor may also be the subject of a voluntary commitment, though not without the consent of a parent or guardian. Wis. Stat. §§ 51.13, 51.61(6). If the child is under the age of 14, the minor is not required to consent, only the parent or guardian. If the child does make a

statement or exhibit conduct that indicates the minor does not agree to the admission to the facility, it must be noted on the face of the application. Wis. Stat. § 51.13(1)(a). If the minor is age 14 or older, the minor and parent must consent to the voluntary commitment. Wis. Stat. § 51.13(1)(b). The only exception to requiring parental consent for voluntary treatment is for minors 12 years old or older seeking treatment for abuse of alcohol or other drugs. Wis. Stat. § 51.47(1).

Involuntary civil commitments of minors can be initiated in three ways: (1) an individual who was voluntarily admitted to a treatment facility is later denied their request for discharge, (2) a petition for civil commitment is prepared by the county corporation counsel and signed by three adults (also known as a three-party petition), or (3) a law enforcement officer detains an individual on the basis of observed behavior or reliable witness accounts. Wis. Stat. § 51.13 (specifically regarding minors, referencing Wis. Stat. §§ 51.15, 51.20, 51.45). All three types of involuntary commitment require an emergency detention petition be filed with the circuit court. The emergency detention petition then forms the basis for a probable cause hearing.

The quickest route to initiate commitment proceedings is through law enforcement emergency detention. Law enforcement officers may do an emergency detention of individuals alleged to be mentally ill when the subject poses a significant risk to themselves or others as established by behavior observed by the officer or reliable witness accounts. The officer must file a statement detailing the basis for detention, identify any witnesses to the behavior, and allege that the officer believes the individual meets the criteria for commitment. Wis. Stat. § 51.15(1), (2), (5).

A three-party petition for examination requires three adults to sign the petition for involuntary commitment. The petition must state a belief that the subject of the petition is mentally ill and in need of treatment and support it with specific examples of statements or acts by the individual to support that belief. The petition must indicate a concern that the subject is a danger to themselves or others, including threats or attempts at suicide. For a sample form for the three-party petition, see Marathon Cnty., *Questionnaire–Mental Illness*, https://www.co.marathon.wi.us/Portals/0/Departments/CRP/Documents/3PartyPetitionMIQuestionnaire.pdf (last visited May 6, 2021).

Once a civil commitment proceeding is initiated, there are two court hearings to complete the action. The first hearing, known as the probable cause hearing, must be held within 72 hours after the petition is filed. Wis. Stat. § 51.20(7). A probable cause hearing requires the subject of the action to be detained and transported to a facility until the hearing. The petitioner must testify before the court and may be cross-examined by the subject's attorney. If probable cause is found after the hearing, the subject will be evaluated by court-appointed examiners and wait in a facility for the second hearing, known as the final hearing.

The final hearing usually occurs within 14 days after the probable cause hearing. Wis. Stat. § 51.20(9), (10), (13)(e). The final hearing may be a jury trial and, in the case of a three-party petition, include testimony from all three petitioners. After the final hearing, if the subject is committed, they must be treated in the least restrictive environment consistent with their needs. For some minors, this may include return to the parent or guardian for outpatient care, though there is no minimum commitment time a court is required to order for inpatient treatment. The initial order for commitment cannot exceed six months. Renewal orders cannot exceed one year.

IV. Confidentiality and Release of Records—Limits and Concerns [§ 5.8]

A. In General [§ 5.9]

Minors are the subject of a variety of records that may be at issue in the course of representation in civil and criminal court and even in cases in which the minor is not a party to the case directly. Different types of records are subject to different laws and are protected differently.

B. School Records [§ 5.10]

Educational records are protected by both federal and state law. 20 U.S.C. § 1232g; Wis. Stat. § 118.125. The Family Educational Rights and Privacy Act, commonly known as FERPA, protects a minor from the school disclosing educational records to someone other than the minor's parent or guardian until the minor reaches the age of majority. 20 U.S.C. § 1232g. Educational records can be requested by the court system for civil or criminal proceedings.

FERPA protects the release of the pupil records from general disclosure, but schools can disclose the records without written consent in certain circumstances, including if the disclosure is to comply with a judicial order or lawful subpoena, is in connection to a health or safety emergency, or is to state and local authorities within the juvenile justice system as required by state law. 34 C.F.R. § 99.31. A subpoena is only sufficient for release of pupil records for law enforcement purposes and does not include a subpoena issued by a defendant in a criminal case. 20 U.S.C. § 1232g(b)(1)(J)(ii); Wis. Stat. § 118.125(2)(q)3.

The records can be released for review by a court prior to release to the state and defense in a criminal proceeding in response to a subpoena from a defendant in some circumstances. Wisconsin courts have not interpreted the federal statute, but courts interpreting FERPA have held that a defendant in a criminal case must first make some showing of need before issuing a subpoena. 20 U.S.C. § 1232g(b)(2)(B); *People v. Bachofer*, 192 P.3d 454, 460 (Colo. App. 2008); *Zaal v. State*, 602 A.2d 1247 (Md. 1992).

Interestingly, FERPA does not specifically allow minors who are separated from their parents the rights normally afforded to the parents and otherwise eligible students. 34 C.F.R. § 99.5(b); U.S. Dep't of Educ., *Frequently Asked Questions*, https://studentprivacy.ed.gov/frequently-asked-questions (last visited May 6, 2021). Schools may use their discretion in determining whether an unaccompanied minor is responsible enough to exercise the privileges afforded under FERPA, such as reviewing records and consenting to their disclosure.

C. Medical Records [§ 5.11]

Generally, medical records for adults and minors alike are protected by the Health Insurance Portability and Accountability Act (HIPAA). 42 U.S.C. § 1320d. HIPAA is a federal act intended to create national standards to protect individuals' medical records and other personal health information. Notably, HIPAA does not protect against court orders for the release of information or subpoenas for records, but it does require compliance with the privacy rule. 45 C.F.R. § 164.512(e). The privacy rule requires the medical provider to notify the person (or their parent or guardian for minors) who is the subject of the information about the request to allow that individual to object or seek a qualified protective court order.

If the medical records are a minor's mental health treatment records from a facility, the statutes differentiate between persons under the age of 14 and those 14 years old and older. A minor under the age of 14 cannot authorize disclosure of their personal health information without parental authority, nor can they deny the parent or guardian access to the information. At age 14 or older, however, they may authorize the disclosure of private health information absent a parent's or guardian's consent, though they cannot deny disclosure of the information to the parent or guardian generally. Wis. Stat. § 51.30. A minor may file a written objection to parental access to court and treatment records with the records custodian. Wis. Stat. § 51.30(5)(b)1.

D. Records of Children [§ 5.12]

When representing a parent or child, attorneys may want to see records concerning the child, including law enforcement records to prove the case. Generally, gaining access to records concerning a child requires the consent of at least one parent or other adult with legal authority. Wis. Stat. §§ 48.979, 146.81(5), 146.82(1). While the information of others involved in the incident must be redacted, a parent, guardian, or legal custodian of a child may request a law enforcement report concerning the child. If the child is 14 years old or older, the child can also request the report. Wis. Stat. § 48.396(1b).

V. JIPS and Delinquency Proceedings When the Client Has Mental Illness [§ 5.13]

In Wisconsin, minors with mental health concerns who are alleged to have violated the law may face one of two systems under the Juvenile Justice Code: juvenile in need of protection or services (JIPS) (commonly referred to as JIPS cases) or the juvenile delinquency process. *See generally* Wis. Stat. ch. 938. A juvenile is anyone under the age of 18, except for purposes of investigating or prosecuting criminal cases, in which case a juvenile is anyone who has not reached the age of 17 years old. Wis. Stat. § 938.12.

A JIPS case relates to a juvenile under the age of 17 in specific circumstances, frequently related to the juvenile's mental health. Contrast this with children in need of protection or services (CHIPS) cases, which exist when someone else has improperly performed their responsibilities to a child. *See* Wis. Stat. chs. 48, 54. A petition for JIPS must allege specific concerns, including any of the following:

- A parent needs assistance controlling a juvenile.
- The juvenile is habitually truant from school.
- The juvenile has dropped out of school.
- The juvenile is habitually truant from home and efforts to reunite have failed.
- The juvenile is under 10 years old and committed a delinquent act.
- The juvenile is not responsible for a delinquent act by reason of mental disease or defect or has been determined to be not competent to proceed.

Wis. Stat. § 938.13. JIPS petitions may be made by law enforcement officers, school officials, or family members. A JIPS petition is heard by a judge and presented by a prosecutor. The court may order services but not placement in a facility. See section 5.7, *supra*, on civil commitments, for more information.

Once a JIPS petition has been filed, the court process begins with a jurisdictional hearing to establish whether there is sufficient merit to proceed. At this point, the prosecutor may raise concerns about the juvenile's mental health, especially if mental disease or defect is the basis for the petition or when the petition is based on concerns about the juvenile's ability to control their behavior. After the jurisdictional hearing, the court may consider pretrial motions, including those related to specific theories of defense for juveniles asserting mental disease or defect. If the juvenile's mental health is in question, the court may order a psychological evaluation for competency.

The final hearing is known as a dispositional hearing, at which it is determined whether the subject of the petition is a juvenile in need of protection or services. The dispositional hearing may be a jury trial and would likely require evidence of the juvenile's mental health and any concerns or treatment. If the court or jury finds the subject of the petition is a juvenile in need of protection or services, the final orders may require ongoing counseling, supervision by a child welfare agency, or placement of the juvenile in a group home or residential treatment center.

The other type of proceeding minors may experience under the Juvenile Justice Code is a delinquency proceeding. For a helpful guide on delinquency in Wisconsin, see the Wisconsin State Public Defenders' guide: *Juvenile Delinquency Cases Materials*, https://www.wispd.org/index.php/juvenile-delinquency-cases (last visited May 6, 2021). Unlike JIPS proceedings, juvenile delinquency proceedings apply to persons ages 10 to 17 who commit a delinquent act and are competent to proceed. A delinquent act is a violation of federal or state law that would be considered a crime if committed by an individual over the age of 17. Similar to JIPS petitions, a referral to juvenile court intake services may be made by law enforcement, school officials, or family members.

Delinquency cases disparately affect youth of color in Wisconsin. Despite a decrease in the overall number of youth entering the juvenile justice system in Wisconsin, Wisconsin is one of the states with the largest Black to white disparity rates for youth. Wis. Off. of Children's Mental Health, *OCMH Fact Sheets*, *Supporting Child Well-Being Through Highlighting Disparities in Youth Justice* (Oct. 2020) [hereinafter *Supporting Child Well-Being*], https://children.wi.gov/Pages/ResearchData/FactSheets.aspx.

A juvenile delinquency proceeding may remain in juvenile court or may be waived into adult court, depending on specific circumstances. Occasionally the waiver system moves the other way and a case originally set in adult court may be waived into juvenile court. The waiver into or out of juvenile court does consider the seriousness of the offense, but also looks at the juvenile's mental illness or developmental disabilities and the adequacy and suitability of facilities, services, and procedures for treatment. Wis. Stat. §§ 938.18, 938.183. The prosecutor considers the offense and age of the juvenile and requests the court waive the case into adult court. A waiver hearing will be held with an opportunity for the juvenile to respond and object to the waiver. Similarly, for a case that starts in adult court, a juvenile may petition the court to transfer the case to juvenile court. Sometimes a judge may initiate the waiver process, but then a different judge must hear the waiver and the original judge cannot continue to be involved in the case.

The defendant or state may raise the question of competency for a juvenile who is alleged to be delinquent. Wis. Stat. § 938.30(5)(c). Competency for juveniles requires a similar analysis to that of adults; the question is whether the individual lacks substantial mental capacity to understand proceedings or assist in the defense and whether they have a rational and factual understanding of the proceedings against them. Wis. Stat. § 971.13; *Drope v. Missouri*, 420 U.S. 162, 171 (1975); *Dusky v. United States*, 362 U.S. 402 (1960). The standard does not require definitive proof that the juvenile does not understand the proceedings, merely "some evidence raising doubt as to his competence." *State v. McKnight*, 65 Wis. 2d 582, 595, 223 N.W.2d 550 (1974).

If the court finds the juvenile was not responsible by reason of mental disease or defect, the court must dismiss the delinquency petition and order either involuntary commitment or the initiation of a JIPS petition. If a juvenile is alleged to be delinquent or in need of protection or services and comes before the court, the court may proceed under Wis. Stat. ch. 51 or 55 instead if the juvenile appears to have a developmental disease or mental illness, as well as if the juvenile is drug or alcohol dependent. Wis. Stat. § 938.135. It is therefore especially important to raise concerns about the juvenile's mental health early in a case to ensure the juvenile receives services and is placed in the least restrictive environment.

Youth in corrections facilities have high rates of mental illness. As of January 2020, 100% of female youth and 72% of male youth held in Wisconsin youth corrections facilities had a mental health issue. *Supporting Child Well-Being*, *supra.*

VI. Guardianship of Minors [§ 5.14]

A. In General [§ 5.15]

In some cases, children live with adults other than their parents, whether because of governmental intervention or because the parents are unable or unwilling to oversee the care of the child. In those situations, guardianship may be appropriate. Guardianship is a legal status granted by a court that gives the caregiver (that is, the guardian) the duty and authority to make decisions about the life and development of the child and general welfare. Wis. Stat. § 48.023. Guardianships are a type of court order allowing people who are not a minor child's parents to have legal control over the care and custody of a minor child.

B. CHIPS Guardianships [§ 5.16]

Guardianships that arise from governmental intervention and child protective services (called CHIPS guardianships) are appropriate if the child has been adjudged to be in need of protection or services and been placed outside the parental home pursuant to a court order. Wis. Stat. § 48.977. A child may be in need of protection by the court if the parents are unable to provide a minimally sufficient level of care. *See* Wis. Stat. § 48.13. Guardianships are appropriate when it is not in the child's best interest to terminate parental rights but a nonparental caregiver with legal authority is needed. Placement and guardianship may be a kinship guardianship or a subsidized guardianship. Wis. Stat. § 48.977.

A guardianship under Wis. Stat. § 48.977 may be full or limited. A limited guardianship provides duties and authority to the guardian as specified by the order of appointment. Wis. Stat. § 48.977(5). A full guardianship has broad authority relating to the care and development of the child as outlined in Wis. Stat. § 48.023. A full guardian is expected to have placement of the child and serve as guardian until the child is 18 years old. Wis. Stat. § 48.977(2)(b).

CHIPS guardianships can be filed by a guardian ad litem, a parent, a nominated guardian with whom the child currently resides, the Wisconsin Department of Children and Family (DCF), or the district attorney's office or corporation counsel for the county. Wis. Stat. § 48.977(4). Some CHIPS cases arise from abuse or neglect of the child and others stem from the parents needing additional supports to properly care for and parent the child, especially in cases in which the parents experience mental health issues themselves or both the parent and child are facing challenges related to mental health. In some cases, a guardian will enter into a subsidized guardianship agreement, in which situation the CHIPS case is closed. If the guardian is unsubsidized, the CHIPS case remains open. Wis. Stat. § 48.977(3r). Subsidized guardianship is used for children placed in foster care when adoption or reunification with the parents are not the best options. Subsidized guardians receive a monthly payment based on the Foster Care Rate Setting Policy, and the child receives medical insurance through Title XIX Medicaid. Wis. DCF, *Subsidized Guardianship in Wisconsin*, https://dcf.wisconsin.gov/guardian/subsidized (last visited May 6, 2021).

C. Guardianships Under Wis. Stat. § 48.9795 [§ 5.17]

1. In General [§ 5.18]

So-called private guardianship of minors was recently removed from Wis. Stat. ch. 54 and integrated into Wis. Stat. ch. 48. Wis. Stat. § 48.9795 was enacted February 28, 2020, and came into effect August 1, 2020. *See* 2019 Wis. Act 109, https://docs.legis.wisconsin.gov/2019/related/acts/109; Wis. Children's Ct. Improvement Program, E-Learning Activities Module 3: Specialty Topics, § 48.9795 Guardianship, https://www.wicciptraining.com/ELearningActivities/View/41?name=%C2%A7-48.9795-guardianship&Area=%20 (last visited May 6, 2021). The new statutory language created a new process and standards for appointment of a guardian of the person of a minor. Guardianship of the estate for children remains in Wis. Stat. ch. 54 but may be consolidated with actions under the new Wis. Stat. ch. 48 procedures. Wis. Stat. § 48.9795(2)(b). The Wis. Stat. ch. 54 guardianships were "private" in that they did not require involvement by a governmental agency such as child protective services or the DHS, as those in Wis. Stat. ch. 48 did. 2019 Wis. Act 109. This bill removed private guardianships of minors from the probate court to the children's court, because Wis. Stat. ch. 54 (2017–18) primarily focused on adult guardianships and therefore did not fully explore the needs of families with guardianships for children. Guardianships of Children: Testimony on Assembly Bill 47 (Jan. 22, 2020) (statement of Jim Steineke), https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2019/ab47/ab0047_2020_01_22.pdf. *See generally* 2019 Wis. Assemb. B. 47, https://docs.legis.wisconsin.gov/2019/proposals/ab47; Wis. Stat. ch. 54.

The new language in Wis. Stat. § 48.9795 outlines four types of guardianships apart from the existing guardianships provided for in Wis. Stat. ch. 48: full, limited, temporary, and emergency. *See generally* Wis. Stat. ch. 48. Regardless of the type of guardianship, a parent retains all rights and duties that are not assigned to the guardian or otherwise limited by statute or court order.

This replaces the former provisions from Wis. Stat. ch. 54 that allowed for a 60-day temporary guardianship with the option for one additional 60-day period or a permanent guardianship.

Note. While certain parts of the guardianship process and the necessary forms are required by statute, many practices vary by county.

For more information and in-depth coverage of minor guardianships under Wis. Stat. § 48.9795, see Henry J. Plum, *Minor Guardianships of the Person: Wisconsin Children's Court Practice and Procedure* (State Bar of Wis. 2020).

2. Types of Guardianship Under Wis. Stat. § 48.9795 [§ 5.19]

a. Full Guardianship [§ 5.20]

Full guardianship is a permanent guardianship and requires that the court find that the child's parents are unfit, unwilling, or unable to provide for the care, custody, and control of the child or other compelling facts and circumstances that demonstrate the necessity of a full guardianship. Wis. Stat. § 48.9795(2)(d)1., (4)(b). A parent who is unable or unwilling to work with a child with mental health issues to get medical treatment may fall into this category, because failing to provide necessary medical care can rise to the level of child neglect. Wis. Stat. § 948.21(2). After appointment, a full guardian has the duties and authority granted to other guardians under Wis. Stat. ch. 48, as well as the following: the authority, subject to a court order, to determine reasonable visitation with the child; the right to change the child's residence from Wisconsin to another state; and the duty to report to the court immediately regarding any address changes and annually regarding the child's condition. Wis. Stat. § 48.9795(2)(d)1.

b. Limited Guardianship [§ 5.21

A guardian in a limited guardianship has the duties and authority of a full guardian to the extent relevant to the duties or authority of the limited guardian, except as limited by the order appointing the guardian. Wis. Stat. § 48.9795(2)(d)2. By limiting the guardian's authority, the court allows the parent to retain the power to make decisions within the parent's ability—which may be particularly useful for parents with significant mental health issues that affect parenting—and may even include orders for shared physical custody of the child between the guardian and the parent if that is in the best interest of the child. A limited guardianship must have an expiration date, though it may be extended for good cause. *Id.*

c. Temporary Guardianship [§ 5.22]

A temporary guardianship is appropriate if the child's parent is unable to provide for the care, custody, and control of the child for a temporary period. Wis. Stat. § 48.9795(2)(d)3. It does require appointment of a temporary guardian for a period not to exceed 180 days, though it may be extended for one additional 180-day period upon a showing of good cause. Wis. Stat. § 48.9795(5). The authority of a temporary guardian must be limited to acts reasonably related to the reasons for the appointment. *Id.*

d. Emergency Guardianship [§ 5.23]

An emergency guardianship may be granted for up to 60 days if it is demonstrated to the court that the welfare of the child requires immediate appointment of an emergency guardian. Wis. Stat. § 48.9795(2)(d)4., (6). The authority for the guardian must be limited to those acts reasonably related to the reasons for the appointment.

3. Procedures Under Wis. Stat. § 48.9795 [§ 5.24]

The procedures for a full, limited, or temporary guardianship are largely the same. Any person, including a child 12 years old or older, may petition for the appointment of a guardian of the person for a child. Wis. Stat. § 48.9795(4)(a)1. Petitions for guardianship must include the type of guardianship requested, information to establish the need for a guardianship, the name and address of a proposed guardian, and other specifics outlined by statute. Wis. Stat. § 48.9795(4). A guardianship proceeding requires the appointment of a guardian ad litem to represent the best interests of the child in court. Wis. Stat. § 48.9795(3).

The initial hearing must be held within 45 days after the filing of the petition. Any adjournment or contested hearing must be set for a fact-finding and dispositional hearing not more than 30 days after the initial hearing. Wis. Stat. § 48.9795(4)(e).

In determining whether to approve the guardianship, the court must consider the nomination of the parent or a child 12 years old or older, through the guardian ad litem or the child's counsel if the child has separate counsel, and the opinions of the parents and child as to what is in the best interests of the child. Wis. Stat. § 48.9795(4). The court must also consider whether the proposed guardian would be fit, willing, and able to serve as the guardian and whether the appointment of the proposed guardian is in the child's best interests. If the child is

an Indian child, the placement must show preference as required for an Indian child in an Indian child custody proceeding, absent good cause to depart from that requirement. *Id.*

The petition for an emergency guardianship is similar to that of a full, limited, or temporary guardianship, but it must also specify the reasons for the appointment and the powers requested for the emergency guardian. Wis. Stat. § 48.9795(6). An emergency petition requires the court to hold a hearing as soon as possible after the petition is filed, and the court may issue a temporary order appointing an emergency guardian without a hearing until a hearing can be held. Wis. Stat. § 48.9795(6)(b)4.

Any person who receives notice of the emergency guardianship petition has a right to a hearing for reconsideration or modification of an emergency guardianship.

A guardianship continues until the child turns 18 years old unless a court ordered the guardianship for a shorter period. Wis. Stat. §48.9795(11); *see also* Wis. Stat. §48.977(7). Guardianships also terminate if the child marries or dies; the child moves to a new state and guardianship is established in the new state; the guardian dies, resigns, or is removed for cause and no successor guardian is appointed; the parent or child successfully petitions the court to terminate the guardianship; or the child is adopted. Wis. Stat. § 48.9795(11). A parent or child may petition to terminate the guardianship alleging that there has been a substantial change in circumstances since the last order was entered, including that the parent is fit, willing, and able to carry out the duties of a guardian; filing such a petition triggers a court hearing to assess whether the preponderance of the evidence supports terminating the guardianship. Wis. Stat. § 48.9795(11)(b).

VII. Emancipation [§ 5.25]

Wisconsin has no formal process for a minor to request emancipation, though emancipation is possible in limited circumstances. (The Menominee Indian Tribe of Wisconsin has specific language in the Tribal Government Code for emancipation. Tribal Gov't of Menominee Indian Tribe of Wis., Article X Emancipation, https://www.ecode360.com/36565292 (last updated July 16, 2020).) The specific scenarios are carved out by statute, but the minor's parent or guardian might still have some responsibilities to the child even after emancipation. In Wisconsin, a parent has a statutory duty to support their child until the child is 18 years old, or 19 if the child is enrolled in high school or working toward a high school equivalency degree. Wis. Stat. § 767.511(4); *see Niesen v. Niesen*, 38 Wis. 2d 599, 602, 157 N.W.2d 660 (1968).

An emancipated minor is a minor who is or has been married; who has given birth; or who has been freed from the care, custody, and control of their parents with little likelihood of returning to the care, custody, and control of their parents before marriage or the age of majority. Wis. Stat. § 48.375(2)(e). Whether the emancipation is full or partial is determined on a case-by-case basis. A full emancipation means the minor becomes entirely responsible for themselves whereas a partial emancipation deems the minor capable of handling part—but not all—of their lives. *Wadoz v. United Nat'l Indem. Co.*, 274 Wis. 383, 389, 80 N.W.2d 262 (1957) (citation omitted); Am. Bar Ass'n Inst. of Jud. Admin., *Standards Relating to Rights of Minors* (1980), https://www.ncjrs.gov/pdffiles1/ojjdp/83578.pdf.

A court must consider the child's best interest when deciding whether to allow a minor to be emancipated. The child's individual circumstances (such as enduring abuse) and the type of emancipation sought (full or partial) will be considered in determining the child's best interest. For a partial emancipation, the court will consider what rights the minor seeks to gain full control over. Minors may petition for certain rights, including making financial decisions, consenting to medical treatment (including mental health treatment), entering into legally binding contracts, purchasing real estate, engaging in legal actions, and being sued or held liable. Other rights cannot be granted even with a full emancipation of a minor. The rights of adults that cannot be given to a minor include voting, purchasing and consuming alcohol beverages, purchasing and possessing firearms, having a nonrestricted driver's license, and consenting to sexual intercourse with an adult to whom the minor is not married.

The only specific law on medical decision-making for minors in Wisconsin speaks to minors seeking abortion. Parental consent is not required and the minor can petition for emancipation for purposes of obtaining an abortion under three circumstances: if a minor's pregnancy is the product of sexual assault including by a relative, legal guardian, household member, or foster parent; if the minor is facing a medical emergency; or if the minor is likely to attempt suicide. Wis. Stat. § 48.375. In the example of emancipation for purposes of obtaining an abortion, the child would likely be emancipated for that specific circumstance and otherwise continue under the care and control of their parents unless other court orders are made.

There are two circumstances in Wisconsin in which a minor may become fully emancipated, though both require the consent of a parent or guardian. A minor is fully emancipated if the minor gets married or enlists in the military. Wis. Stat. § 765.02(2); *La Crosse Cnty. v. Vernon Cnty.*, 233 Wis. 664, 666, 290 N.W. 279 (1940) (stating that marriage emancipates a minor); *see Niesen*, 38 Wis. 2d at 602 (recognizing that joining the military can be an act of emancipation). Enlisting in the military before the age of majority requires the consent of both parents. 10 U.S.C. § 505(a) (prohibiting enlistment under the age of 17 and requiring parental or guardian consent to enlist

under the age of 18). Current U.S. military policy requires enlistees to have a high school diploma or to have passed the General Educational Development (GED) tests; as such, most minors are 17 or 18 years old when they enlist. *See Join the Military*, https://www.usa.gov/join-military (last updated Apr. 8, 2021).

Minors who have attained the age of 16 may be married with the written consent of the parents, guardians, or custodians of the minor. Wis. Stat. § 765.02(2). Except for a minor who is found to be incompetent, a minor is no longer subject to guardianship of the person upon marriage. If the minor marries, any existing guardianship of the person is revoked. Wis. Stat. §§ 48.9795(11)(a)2., 54.46(6). Upon application, the court may release in whole or in part the income and assets of a minor ward to the ward upon their marriage. Wis. Stat. § 54.46(6).

Minors who wish to become emancipated must demonstrate that emancipation is in their best interest. The request should be filed with the county-level children's court in the county in which the minor resides. At the hearing, the minor should produce medical information necessary for a determination if the full or partial emancipation requested includes medical decision-making as a power granted to the minor. Relevant medical information may include testimony from a mental health professional about the abuse or trauma at the parental or guardian's home or copies of the relevant medical records, though attorneys should consider the confidentiality of medical records when producing such evidence. *See supra* §§ 5.8–.12 (Confidentiality, and Release of Records—Limits and Concerns).

If the minor seeks power over their finances, the emancipation hearing should include documentation of the minor's financial assets. The documentation may include proof of the minor's ability to successfully manage their finances and personal affairs. If a parent of a minor neglects or refuses to provide support for the minor, including educational support, the earnings of the minor are the minor's sole property. Wis. Stat. § 48.987.

For any hearing on emancipation of a minor, the minor should produce documentation and testimonial evidence of the minor's legal situation and why the minor should have control of the situation, in full or in part. If the minor lives away from the parent or guardian at the time, the minor should provide documentation of the minor's current living situation and means of support. If the minor has mental health concerns, the emancipation hearing will also consider the effect of those concerns on the minor's ability to make their own decisions. For those with mental health concerns, medical records and testimony are more likely to be at issue, even for financial powers.

If emancipation is in question, it may be proved with a court order of emancipation, marriage certificate, or proof of enlistment in the armed forces.

VIII. Benefits [§ 5.26]

A. Supplemental Security Income for Children [§ 5.27]

1. In General [§ 5.28]

Congress created the Supplemental Security Income (SSI) program in 1972. Some low-income people (e.g., people who are age 65 years old or older, blind, or disabled) may qualify for monthly SSI payments. Children who are blind or disabled may also quality for SSI. SSI payments are available to low-income individuals who lack the work history, either because of employment status or age, to qualify for full benefits from a different program known as Social Security Disability (SSDI). Some SSDI recipients are also concurrently eligible for SSI if their SSDI payments are relatively low. Soc. Sec. Admin. (SSA), *Understanding Supplemental Security Income (SSI) Overview—2021 Edition*, https://www.ssa.gov/ssi/text-over-ussi.htm.

Mental health issues are more prevalent in children living in poverty, which is reflected in the makeup of SSI program recipients. Approximately 50% of the children in the United States who receive SSI are disabled primarily based on a mental health disorder. Committee to Evaluate the Supplemental Security Income Disability Program for Children with Mental Disorders et al., *Mental Disorders and Disabilities Among Low-Income Children* (Thomas F. Boat & Joel T. Wu, eds., 2015), https://www.ncbi.nlm.nih.gov/books/NBK332882/.

As of December 2018, 20,738 children under the age of 18 received SSI in Wisconsin. SSA, *SSI Annual Statistical Report, 2018 – Children Under Age 18*, https://www.ssa.gov/policy/docs/statcomps/ssi_asr/2018/sect04.pdf. The average monthly benefit of a Wisconsin child recipient in 2018 was $647.77. Id. The maximum monthly payment for 2021 is $794. SSA, *SSI Federal Payment Amounts for 2021*, https://www.ssa.gov/oact/cola/SSI.html (last visited May 6, 2021).

There is a periodic cost-of-living adjustment for benefits. 20 C.F.R. § 416.405. Although an SSI recipient receiving even the maximum monthly payment still falls short of the federal poverty line, these payments make a big difference for families dealing with combined poverty and disability. SSI payments for minors serve to reduce poverty, improve future outcomes, and help families with children with disabilities who must deal with extra obligations like medical appointments, school meetings, more complex daily needs, and emergencies. Kathleen Romig, Ctr. on Budget & Pol'y Priorities, *SSI: A Lifeline for Children with Disabilities* (May 11, 2017), https://www.cbpp.org/research/social-security/ssi-a-lifeline-for-children-with-disabilities.

2. Criteria for Child [§ 5.29]

A child is considered disabled for purposes of receipt of SSI if the child is not engaged in substantial gainful activity and has a medically determinable physical or mental impairment that results in marked and severe functional limitations and that (1) can be expected to result in the child's death or (2) has lasted or can be expected to last for a continuous period of at least 12 months. 42 U.S.C. § 1382c(a)(3)(C).

3. Eligibility [§ 5.30]

A child can be eligible for SSI if the child meets the medical and financial eligibility criteria. For the medical eligibility, the adjudicator looks to the Social Security Administration (SSA)'s childhood listing of impairments (the childhood listings). 20 C.F.R. § 416.925. The listings contain medical criteria used to evaluate impairments. Adjudicators use a separate adult listing for applicants who are 18 or older.

The childhood listings are broken into 15 categories; of those categories, 112.00 Mental Disorders is the most common category under which children with mental health issues are evaluated. Here is an example providing the childhood listing for anxiety and obsessive compulsive disorder (OCD) for children ages 3 to 18:

112.06 Anxiety and obsessive-compulsive disorders (see 112.00B5), for children age 3 to attainment of age 18, satisfied by A and B, or A and C:

A. Medical documentation of the requirements of paragraph 1, 2, 3, or 4:
   1. Anxiety disorder, characterized by one or more of the following:
      a. Restlessness;
      b. Easily fatigued;
      c. Difficulty concentrating;
      d. Irritability;
      e. Muscle tension; or
      f. Sleep disturbance.
   2. Panic disorder or agoraphobia, characterized by one or both:
      a. Panic attacks followed by a persistent concern or worry about additional panic attacks or their consequences; or
      b. Disproportionate fear or anxiety about at least two different situations (for example, using public transportation, being in a crowd, being in a line, being outside of your home, being in open spaces).
   3. Obsessive-compulsive disorder, characterized by one or both:
      a. Involuntary, time-consuming preoccupation with intrusive, unwanted thoughts; or
      b. Repetitive behaviors that appear aimed at reducing anxiety.
   4. Excessive fear or anxiety concerning separation from those to whom you are attached.

   AND

B. Extreme limitation of one, or marked limitation of two, of the following areas of mental functioning (see 112.00F):
   1. Understand, remember, or apply information (see 112.00E1).
   2. Interact with others (see 112.00E2).
   3. Concentrate, persist, or maintain pace (see 112.00E3).
   4. Adapt or manage oneself (see 112.00E4).

   OR

C. Your mental disorder in this listing category is "serious and persistent;" that is, you have a medically documented history of the existence of the disorder over a period of at least 2 years, and there is evidence of both:
   1. Medical treatment, mental health therapy, psychosocial support(s), or a highly structured setting(s) that is ongoing and that diminishes the symptoms and signs of your mental disorder (see 112.00G2b); and
   2. Marginal adjustment, that is, you have minimal capacity to adapt to changes in your environment or to demands that are not already part of your daily life (see 112.00G2c).

SSA, *Disability Evaluation Under Social Security: Listing of Impairments – Childhood Listings (Part B)*, https://www.ssa.gov/disability/professionals/bluebook/112.00-MentalDisorders-Childhood.htm#112_06 (last visited May 6, 2021).

A child can satisfy the medical eligibility for SSI in one of three ways: medically meeting the childhood listings, medically equaling the childhood listings, or functionally equaling the childhood listings. A child medically meets the childhood listings when the child satisfies all the requirements in the listing and the duration requirements. In the case of a child with anxiety or OCD, the child would medically meet the listings if the child satisfies all the requirements listed in 112.06(A) and (B) or all the requirements listed in 112.06(A) and (C). *See* 20 C.F.R. § 416.925.

If the child does not meet the listing, they can still be eligible if they medically equal the listing by showing that their impairment is at least equal in severity and duration to the criteria in the listing. 20 C.F.R. § 416.926.

If the child does not meet or equal the listing, they can still satisfy eligibility by functionally equaling the listing. 20 C.F.R. § 416.926a; *Sullivan v. Zebley*, 493 U.S. 521 (1990). A child functionally equals the listings if they have a marked limitation in two of the six listed domains or one extreme limitation. The domains are acquiring and using information, attending and completing tasks, interacting and relating with others, moving about and manipulating objects, caring for oneself, and health and physical well-being. Functionally equaling the listings can be especially helpful for cases in which a child has multiple medical issues and none individually is severe enough to qualify the child for benefits.

4. Evidence [§ 5.31]

Evidence is important for SSI cases and can include medical records, medical examinations, test results, school records, special education documents and assessments, and testimony by the child's caregivers and possibly the child themselves, depending on the child's age. It can be difficult for a child with a mental health issue to get SSI if they are not actively in treatment because they will lack the necessary evidence. The adjudicator sends out releases to the child's treating medical providers, school, and anyone else who might have important information about the child's impairment.

Practice Tip. It is in the family's best interest to try to obtain and submit this evidence themselves because the adjudicator does not typically follow up on records requests. If the treating medical provider or school does not respond to the records request, the adjudicator generally will not have that evidence to consider unless the applicant themselves obtain and submit the evidence.

The adjudicator can send the child for a consultative exam paid for by the SSA if the adjudicator deems it necessary. 20 C.F.R. § 416.919. A consultative exam can include a behavioral health assessment. A long history of treatment is often more persuasive and better evidence than a one-time consultative exam with a provider with whom the child does not have an ongoing relationship.

5. Financial [§ 5.32]

The financial eligibility requirements are complex, but, in general,

> a working family may qualify for a full benefit for a child with a disability if they earn up to about 100 percent of [the federal poverty guideline, $26,500 for a family of four for 2021]. The benefit gradually declines as earnings rise, and eligibility phases out at about 200% of [the federal poverty guideline, $53,000 for a family of four for 2021].

Kathleen Romig, Ctr. on Budget & Policy Priorities, *SSI: A Lifeline for Children with Disabilities* (May 11, 2017) (footnote omitted), https://www.cbpp.org/research/social-security/ssi-a-lifeline-for-children-with-disabilities; Annual Update of the HHS Poverty Guidelines, 86 Fed. Reg. 7732 (Feb. 1, 2021); *see also* U.S. Dep't of Health & Human Servs., *HHS Poverty Guidelines for 2021* (Jan. 15, 2021), https://aspe.hhs.gov/poverty-guidelines. The SSA has many specific financial eligibility rules, including for deeming of income (determining when someone else's income affects the SSI recipient's benefit amount). *See* 20 C.F.R. §§ 416.1100–.1148; 20 C.F.R. §§ 416.1160–.1169.

6. Process [§ 5.33]

Even for children who clearly meet the medical and financial criteria for SSI, the approval process can still be complicated. Employees of the SSA gather and determine financial eligibility while an adjudicator with the Wisconsin Disability Determination Bureau (DDB) makes the initial medical decision on a child's SSI application. Wis. Dep't of Health Servs., *Wisconsin Disability Determination Bureau*, https://www.dhs.wisconsin.gov/ddb/index.htm (last revised Dec. 19, 2018). Many applications are denied at the initial level. This can be

especially true when a child has a mental health disorder because the evidence is more subjective to review than something concrete like a test result or lab result.

The issue is made worse by the shortage of behavioral health care providers in Wisconsin, in particular pediatric and adolescent providers. Wis. Dep't of Health Servs., *Number of Psychiatrist FTEs Needed to Remove Shortages for the Resident Population* (Sept. 2019), https://www.dhs.wisconsin.gov/publications/p0/p00376.pdf. With a lack of providers, especially outside Dane and Milwaukee Counties, behavioral health care can be difficult for children to access. Finding a pediatric or adolescent behavioral health care provider who speaks a language other than English or who can provide culturally relevant services to children is even more difficult. Children who are not actively being treated for their mental health issues face a higher chance of being denied SSI because of a lack of evidence of their mental health disorder.

When a Wisconsin DDB adjudicator denies a child's SSI case, the family may appeal. There are multiple levels of appeal to go through, starting with a reconsideration process, then a hearing with an administrative law judge, review by an appeals council, and, finally, federal court review. 20 C.F.R. § 416.1407; 20 C.F.R. § 416.1429; 20 C.F.R. § 416.1483. The appeal process can be very time consuming, onerous, and stressful for a child, especially for a child with a mental health issue. The process can also take a long time, during which the child does not receive benefits. SSA, *Average Wait Time Until Hearing Held Report* (Oct. 2020), https://www.ssa.gov/appeals/DataSets/01_NetStat_Report.html.

7. Ongoing Eligibility [§ 5.34]

Once a child qualifies for SSI, the SSA conducts periodic reevaluations of the child's ongoing eligibility. 42 U.S.C. § 1382c(a)(3)(H)(ii). When the child is about to turn 18 years old, the SSA conducts a redetermination to determine if the child continues to be eligible for SSI under the more stringent adult standard. 42 U.S.C. § 1382c(a)(3)(H)(iii). If the SSA determines that a recipient is ineligible either at a periodic redetermination or at the age 18 redetermination, the person can go through the appeals process to try to maintain benefit eligibility.

8. Representation [§ 5.35]

Children appealing a negative SSI decision may have an attorney or a representative who is not an attorney to represent them in the process. For initial applications (the child is not currently receiving benefits), the representative generally represents the child on a contingency basis. If the representative wins the case, the representative receives a portion of the child's back payments. A child granted SSI in an initial application generally receives payments back to the date they applied for SSI. For a case in which the child is appealing a redetermination or termination decision and requests aid pending (i.e., the child was receiving benefits, the SSA determined that the child was no longer eligible, and the child appeals and requests that their benefits continue during the appeal process), it can be more difficult for the child to find a representative. Because the child is receiving aid pending, there will be no back payment for the representative to get paid through if the child wins their case. Many civil legal services programs that do SSI cases choose to focus their work on redetermination or termination cases for which the client receives aid pending because the person has no way to pay a private representative.

9. Miscellaneous [§ 5.36]

A child recipient of SSI is entitled to automatic SSI-related Medicaid in Wisconsin and may be entitled to state supplemental payments. Wis. Stat. § 49.77. SSI and state supplemental payments can affect the child support percentage-of-income standard and may be considered by the court in setting child support amounts. Wis. Stat. § 767.511(1m); Wis. Admin. Code § DCF 150.02(13)(a)10.g.

B. Social Security Benefits Based on Parents' Record [§ 5.37]

In addition to SSI, children may be eligible for other types of benefits from the SSA that are based on their parents' record. Children may be eligible for benefits if their parent receives disability or old-age benefits or dies. 20 C.F.R. § 404.350. An important note for children with mental health issues is that these derivative or survivors' benefits can continue into adulthood for people with disabilities when the disability manifested before the child turned 22 years old. Children may be eligible for benefits from the SSA through their grandparents' record in some situations, especially cases in which the child's biological parents are deceased or disabled and the grandparent legally adopts the child. 20 C.F.R. § 404.354.

C. Early and Periodic Screening and Diagnosis and Treatment [§ 5.38]

A federal law provision referred to as early and periodic screening and diagnosis and treatment (EPSDT) requires state Medicaid programs to provide screening, diagnosis, and treatment services for recipients under 21 years of age, including dependent children and childless adults. 42 C.F.R. § 440.40(b). The law was created in response to a government study from the 1960s that found that of the 50% of young men rejected from the military, many were rejected for medical conditions that could have been remediated or prevented if they had been caught and treated early enough. The study also found that these conditions were more likely to occur in children growing up in poverty. ABC for Health, Inc., *An Introduction to EPSDT in Wisconsin*, HealthWatch Wis. Rep. (Feb. 20, 2014) (on file with authors and State Bar of Wisconsin). Thus, Congress created EPSDT to try to ameliorate this problem.

In Wisconsin, EPSDT is called HealthCheck. EPSDT providers can include physicians, outpatient hospital facilities, health maintenance organizations, visiting nurse associations, clinics operated under a physician's supervision, local public health agencies, home health agencies, rural health clinics, Indian health agencies, and neighborhood health centers. Wis. Admin. Code § DHS 105.37(1)(a).

Coverage under HealthCheck includes well-child checks and interperiodic screens, outreach and case management services, and "other services." Well-child checks and interperiodic screens include a variety of screens, exams, and assessments including comprehensive health and developmental history checks (including mental health, as clarified in federal law). *See* 42 C.F.R. § 441.56; Wis. Admin. Code § DHS 107.22.

In addition to diagnostic and treatment services covered by Wisconsin Medicaid, any services described under the federal definition of medical assistance in 42 U.S.C. § 1396d(a) are covered when provided to HealthCheck patients if the HealthCheck health assessment and evaluation indicates they are needed. These are included as "other services." Prior authorization is required for coverage of "other services." Wis. Admin. Code § DHS 107.02(3).

HealthCheck is important for youth with mental health issues because it allows them enhanced and easier access to coverage and earlier diagnosis and treatment, which leads to better long-term results and encourages establishment of early ongoing relationships with behavioral healthcare and other providers. The other-services provision of HealthCheck helps youth with mental health issues gain access, or easier access, to services like in-home psychotherapy, mental health day treatment, comprehensive behavioral health services, and payment for over-the-counter medications such as melatonin, vitamins, and other supplements prescribed by the child's provider.

There is no cost associated with HealthCheck services for people under the age of 18. Wis. Admin. Code § DHS 107.22(7). There is no copayment for HealthCheck services, including "other services." Wis. Dep't of Health Servs., *BadgerCare Plus Eligibility Handbook* 38.2.2, http://www.emhandbooks.wisconsin.gov/bcplus/bcplus.htm (current through Release 21-01, Mar. 29, 2021).

Despite the great benefit that HealthCheck brings to children, especially children with mental health issues, it is an underused benefit. This underutilization is based on lack of provider and community knowledge of the benefit, the prior authorization process, insufficient case management services, and inappropriate denials. Kali Kramolis, *HealthCheck: Better Health for Wisconsin's Vulnerable Children*, at 2 (Apr. 25, 2019), https://safetyweb.org/healthwatchwi/publications/HealthCheck-Better-Health-WI-Children-Optimized.pdf.

IX.
Education [§ 5.39]

A. Special Education [§ 5.40]

1. In General [§ 5.41]

Special education is a combination of federal and state law with the federal Individuals with Disabilities Act (IDEA) and Individuals with Disabilities Education Improvement Act (IDEIA), which set forth the bare minimum that states must provide. Individuals with Disabilities Education Act, Pub. L. 91-230, tit. VI, 84 Stat. 191 (Apr. 13, 1970), *amended by* Pub. L. 108-446, tit. I, § 101, 118 Stat. 2647 (Dec. 3, 2004) (codified at 20 U.S.C. §§ 1400–1482). States determine whether to go above and beyond what federal law requires. A fundamental tenet of special education law is the requirement to provide a free appropriate public education (FAPE) to students with disabilities. 7 C.F.R. § 15b.22(a).

Schools that receive federal funding must provide special education services to eligible children. This generally includes students attending public, charter, and magnet schools but not private schools. A public school still has obligations to evaluate a child residing in their district who attends a private school to see if they qualify as a child with a disability but is not generally required to provide special education or related services unless the student enrolls in the district. Wis. Stat. § 115.777. For special education under federal and

Wisconsin law, a child is defined as someone "who is at least 3 years old but not yet 21 years old and who has not graduated from high school." Wis. Stat. § 115.76(3).

2. Eligibility [§ 5.42]

A *child with a disability* under special education law is a child who needs special education and related services by reason of cognitive disabilities, hearing impairments, speech or language impairments, visual impairments, emotional behavioral disability, orthopedic impairments, autism, traumatic brain injury, other health impairments, or learning disabilities. At the discretion of the local educational agency, a child with a disability may include a child who needs special education and related services based on their significant developmental delay. Wis. Stat. § 115.76(5)(b). A child with a mental health issue can potentially qualify as a child with a disability under any of the eligibility categories but most commonly falls under emotional behavioral disability, autism, or other health impairments. See Wis. Admin. Code § PI 11.36(7), (8), (10).

3. Access [§ 5.43]

The law places the burden on school districts to find and identify students who may need special education services. The "child find" mandate requires districts to proactively identify, locate, and evaluate children with disabilities who need special education and related services. Wis. Stat. § 115.77. The first step in determining whether a child qualifies as a child with a disability is an evaluation. A parent may request an evaluation or the district or another interested party may initiate the process. If a parent requests an evaluation in writing, the district must notify the parent within 15 business days after receiving the referral regarding whether the district intends to evaluate the child. Wis. Stat. § 115.777.

4. Evaluation [§ 5.44]

An evaluation must consist of a variety of assessments tools and strategies. Wis. Stat. § 115.782(2). The district must complete the evaluation and determine if the child has a disability within 60 days after receiving parental consent for the evaluation. Wis. Stat. § 115.78(3). A team consisting of the parents of the child, a regular education teacher, a special education teacher, a representative of the district, a person who can interpret the results of the evaluation (e.g., a school psychologist, occupational therapist, or speech-language pathologist), and the child (if appropriate) makes the decision about whether the child qualifies as a child with a disability. Wis. Stat. § 115.78(1m), (2). The team will also determine the category of disability under which the child qualifies. Wis. Stat. § 115.782(3). *See* Wis. Dep't of Pub. Instruction (DPI), *Evaluation Timeline*, https://dpi.wi.gov/sites/default/files/imce/sped/pdf/sa-eval-timeline-visual.pdf (last visited May 6, 2021).

5. Criteria for Categories Common for Children with Mental Health Issues [§ 5.45]

As stated above, children with mental health issues can qualify for special education services under any category but often qualify under emotional behavioral disability, autism, or other health impairments. Some children with mental health issues might not qualify as a child with a disability for special education purposes if their condition is not severe enough.

To qualify as a child with an emotional behavioral disability, the child must do the following:

1. Demonstrate severe, chronic, and frequent behavior that is not the result of situational anxiety, stress, or conflict;
2. Exhibit social, emotional, or behavioral functioning that so departs from generally accepted, age-appropriate ethnic or cultural norms that it adversely affects a child's academic progress, social relationships, personal adjustment, classroom adjustment, self-care, or vocational skills in school and at least one other setting; and
3. Display any of the following:
   a. Inability to develop or maintain satisfactory interpersonal relationships;
   b. Inappropriate affective or behavior response to a normal situation;
   c. Pervasive unhappiness, depression, or anxiety;
   d. Physical symptoms, pains, or fears associated with personal or school problems;
   e. Inability to learn that cannot be explained by intellectual, sensory, or health factors;
   f. Extreme withdrawal from social interactions;
   g. Extreme aggressiveness for a long period of time; or
   h. Other inappropriate behaviors that are so different from children of similar age, ability, educational experiences, and opportunities that the child or other children in a regular or special education program are negatively affected.

Wis. Admin. Code § PI 11.36(7)(b).

To qualify as a child with autism, the child must

1. Display difficulties or differences or both in interacting with people and events;
2. Display problems that extend beyond speech and language to other aspects of social communication, both receptively and expressively; and
3. Do one or more of the following:
   a. Exhibit delays, arrests, or regressions in motor, sensory, social, or learning skills;
   b. Demonstrate abnormalities in the thinking process and in generalizing;
   c. Exhibit unusual, inconsistent, repetitive, or unconventional response to sounds, sights, smells, tastes, touch, or movement; or
   d. Display marked distress over changes, insistence on following routines, and a persistent preoccupation with or attachment to objects.

Wis. Admin. Code § PI 11.36(8)(b).

To qualify as a child with other health impairments, the child must have limited strength, vitality, or alertness because of chronic or acute health problems. Wis. Admin. Code § PI 11.36(10). A chronic or acute health problem can include conditions such as attention deficit hyperactivity disorder, anxiety, depression, posttraumatic stress disorder, and other mental health conditions.

6. Over Identification and Under Identification [§ 5.46]

There is debate about whether children of color, in particular children who are Black or Native American, are identified as children with disabilities for special education purposes at an appropriate rate. While previous research showed that children of color are over-identified as children with disabilities, new research shows that youth of color have higher rates of special education than white children, but when accounting for factors like poverty and family achievement, students of color are actually underrepresented in special education when compared to their otherwise identical or similarly situated white peers. Nora Gordon, *Race, Poverty, and Interpreting Overrepresentation in Special Education* (Sept. 20, 2017), https://www.brookings.edu/research/race-poverty-and-interpreting-overrepresentation-in-special-education/.

There is an additional layer of how a child is identified and if or how implicit bias affects the team's identification decision. For example, Black children, especially boys, have especially high rates of qualifying for special education under the emotional behavioral disability category. *Id.*

Federal law does require states to identify districts with significant disproportionality by race or ethnicity in students receiving special education and reserve funding to address the disparity. However, it leaves defining "significant disproportionality" up to the states. Many states have not identified a single district with a significant disproportionality by race or ethnicity despite the U.S. Department of Education identifying extensive disproportionality across the country, including in Wisconsin. U.S. Dep't of Educ., Off. of Special Educ. & Rehab. Servs., *Racial and Ethnic Disparities in Special Education* (Feb. 2016), https://www2.ed.gov/programs/osepidea/618-data/LEA-racial-ethnic-disparities-tables/disproportionality-analysis-by-state-analysis-category.pdf. For 2015–2018, Wisconsin identified an average of 35 school districts each year with disproportionality by race, ethnicity, or both and created the Disproportionality Technical Assistance Network, a partnership funded by IDEIA Part B and between the DPI and other stakeholders to address the issue. Disproportionality Technical Assistance Network, *Disparities in Special Education: Overidentification of Students of Color*, http://www.wifacets.org/sites/default/files/wifacets_disparities_in_special_ed_identification-min.pdf (last visited Mar. 29, 2021).

7. Provision of Services [§ 5.47]

Within 30 days after the determination that the child has a disability, the team must have an individualized education program (IEP) in place outlining what services the child will receive. Wis. Stat. § 115.78(3)(c). The IEP must include sections such as a statement of the child's present level of academic achievement and functional performance, a statement of measurable annual goals for the child, a statement about related services and supplementary aids, a statement of accommodations needed, an explanation of time the child will not spend in "regular" classes with children who do not have disabilities, a description of services and modifications the child will receive, and, for a child age 14 or older, postsecondary or transition goals. Wis. Stat. § 115.787(2).

The team will also decide about the child's placement, aiming to keep the child educated with peers who do not have disabilities in a regular education setting as much as possible, sometimes called the "least restrictive environment." Wis. Stat. § 115.79. Placement settings include regular education, inclusion, pull-outs, separate classes, separate schooling, and private placement. State law discusses use of seclusions and restraints, pursuant to a legislative change in 2011 with the goal of lessening the frequency and severity of their use. Wis.

Stat. § 118.305. The team must review the child's IEP at least annually but can make reviews and revisions whenever necessary. Wis. Stat. § 115.787(4)(a)1.

8. Discipline Protections [§ 5.48]

A child with a disability has certain protections against school discipline. 34 C.F.R. § 300.530; 34 C.F.R. § 300.536. The general principle is that the child should not be punished for conduct that was caused by their disability. Despite these protections, the suspension rates for students with disabilities is higher than that of their nondisabled peers in Wisconsin. Wisconsin DPI data shows that for the 2018–19 school year, 6.1% of students without disabilities received suspensions while 23.2% of students with disabilities received suspensions. Wis. DPI, *Out-of-School Suspension Rate by Disability Status (2018-19)*, https://wisedash.dpi.wi.gov/Dashboard/dashboard/20218 (last visited May 6, 2021).

Youth of color who receive special education services are especially likely to face disproportionately high school discipline rates. Daniel Losen et al., Ctr. for Civil Rights Remedies, *Are We Closing the School Discipline Gap?* (Feb. 2015), https://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/AreWeClosingTheSchoolDisciplineGap_FINAL221.pdf.

9. Complaint Process [§ 5.49]

Parents who disagree with the rest of the team in deciding whether a child should be evaluated, whether or how a child qualifies as a child with a disability, and what the child's IEP contains may go through a complaint process. Parents can also participate in a mediation process and request a due-process hearing. Wis. Stat. §§ 115.797, 115.80.

10. Reevaluation [§ 5.50]

A child is generally reevaluated to determine if they still qualify as a child with a disability and to do a comprehensive assessment of their abilities and needs at least every three years. Wis. Stat. § 115.782(4).

11. Transfer of Rights [§ 5.51]

Once the child reaches the age of majority, the parental rights regarding special education transfer to the child unless the parent has guardianship over the now-adult child. Wis. Stat. § 115.807. After rights transfer to the now-adult child, the child may choose if they want their parent involved in IEP meetings, reevaluations, etc., and have the right to exit themselves from the special education program.

It is imperative to begin to prepare the child for this transfer of rights and increase in responsibility and decision-making abilities before the transfer. As they are able, the child should take a more and more active role in their own special education meetings even before they reach the age of majority, so they understand what is at stake and feel comfortable speaking up in meetings and asking questions. A child with mental health conditions such as anxiety may require even more preparation to make sure they are comfortable and not overwhelmed in taking a more active role in their own special education process.

B. Section 504 Services [§ 5.52]

1. In General [§ 5.53]

Section 504 of the Rehabilitation Act applies to recipients of federal financial assistance (such as public, charter, and magnet schools) and prohibits them from engaging in disability discrimination. 29 U.S.C. § 794; 34 C.F.R. pt. 104. Section 504 is enforced by the U.S. Department of Education's Office for Civil Rights (DOE-OCR). The DOE-OCR office that has jurisdiction over Wisconsin is the Chicago Office. U.S. Dep't of Educ., OCR Complaint Assessment Sys., *Contact OCR*, https://ocrcas.ed.gov/contact-ocr? field_state_value=693 (last visited May 6, 2021).

2. Eligibility [§ 5.54]

Under Section 504, an *individual with a disability* is defined as someone who (1) has a physical or mental impairment that substantially limits a major life activity, (2) has a record of such an impairment, or (3) is regarded as having such an impairment. 29 U.S.C. § 705(9)(B), (20)(B); 42 U.S.C. § 12102. Section 504 defines a *physical or mental impairment* as including, among other disorders, any mental or

psychological disorder. 34 C.F.R. 104.3(j)(2)(i); DOE-OCR, *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, https://www2.ed.gov/about/offices/list/ocr/504faq.html (last modified Jan. 10, 2020). A major life activity includes things commonly affected by mental health issues such as caring for oneself, speaking, learning, eating, sleeping, concentrating, thinking, communicating, and working. 29 U.S.C. § 705(9)(b), (20)(B); 42 U.S.C. § 12102(2)(A). Whether a limitation is substantial is a decision made by a team on a case-by-case basis. 34 C.F.R. § 104.35. With the exception of eyeglasses or contact lenses, the team cannot take mitigating measures into account when determining whether a limitation is substantial. This means that for someone with a mental health condition, the team cannot take into account the use of antidepressants, therapy, etc., when determining if the person's mental health issue substantially limits a major life activity.

If a person's impairment occurs episodically or even if a person is in remission, the person still qualifies as having a disability if the impairment would substantially limit a major life activity when in an active phase or flare up. 42 U.S.C. § 12102(4)(D). This is important to keep in mind for people with mental health issues, which can be episodic in nature. While IDEIA covers children ages 3 through 21, Section 504 covers people of any age.

3. Evaluation [§ 5.55]

Similar to the special education requirements, Section 504 also has a "child find" mandate, requiring school districts to identify, find, and evaluate people who qualify as students with disabilities. 34 C.F.R. § 104.32. School districts must conduct an evaluation in a timely manner when they believe a student needs services because of a disability. 34 C.F.R. § 104.35(a). This includes students who exhibit only behavioral and not academic challenges, which can be especially true for students with mental health issues who have no cognitive or learning disabilities. 34 C.F.R. § 104.33. The evaluation must not cost the student anything. 34 C.F.R. § 104.33; 34 C.F.R. § 104.35. Section 504 does not have as detailed timelines in the law as the IDEIA, so the OCR generally looks to the IDEIA to determine reasonable timelines. DOE-OCR, *Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools* (Dec. 2016), https://www2.ed.gov/about/offices/list/ocr/docs/504-resource-guide-201612.pdf. The evaluation and placement procedures must guard against misclassification or inappropriate placement of students. 34 C.F.R. § 104.35. The district must periodically reevaluate students. 34 C.F.R. § 104.35(d).

4. Services [§ 5.56]

Students with disabilities under Section 504 are entitled to FAPE. 34 C.F.R. § 104.33. The district must provide education and related aids and services so that the student with the disability's needs are met as adequately as those of nondisabled peers. 34 C.F.R. § 104.33(b)(1)(i). Students with disabilities must be educated with nondisabled peers as much as possible. 34 C.F.R. § 104.34(a). Section 504 does not require a written 504 plan, but many districts do use a written plan to document provision of FAPE to students with disabilities and to make sure all parties are on the same page about which services the student will receive. DOE-OCR, *Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools* (Dec. 2016), https://www2.ed.gov/about/offices/list/ocr/docs/504-resource-guide-201612.pdf.

5. School Discipline Protections [§ 5.57]

Students with disabilities also have some protections against school discipline under Section 504. In general, the student should not be punished for something that is related to their disability or if the number of days they are disciplined (consecutively or cumulatively) constitutes a change in their placement. DOE-OCR, *Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools* (Dec. 2016), https://www2.ed.gov/about/offices/list/ocr/docs/504-resource-guide-201612.pdf.

6. Complaint Process [§ 5.58]

When a family disagrees with identification, evaluation, or services, they may follow the complaint process through OCR. See 34 C.F.R. § 104.36; DOE-OCR, *How to File a Discrimination Complaint with the Office for Civil Rights*, https://www2.ed.gov/about/offices/list/ocr/docs/howto.html (last modified Jan. 10, 2020).

C. Bullying and Discrimination [§ 5.59]

1. In General [§ 5.60]

Bullying and discrimination is a problem for youth. The percentage of high school students in Wisconsin report experiencing bullying on school property is 22.3%; 17.4% report experiencing bullying online. Katherine McCoy, Wis. DPI, *2019 Wisconsin Youth Risk Behavior Survey Summary Report*, at 9, https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/YRBS_2019_Summary_Report_DPI_Web_Version.pdf. The problem is especially problematic for youth with health issues, such as mental health conditions. High schoolers with health issues are 13.8% more likely to see bullying as a problem at school than their peers without health issues. *Id.* Bullying can also have a negative effect on a child's mental health, exacerbating a preexisting mental health issue or being a cause of a mental health issue. This bullying can happen by other students or even school staff.

2. Federal Protections [§ 5.61]

Section 504, enforced by the DOE-OCR, prohibits federal funding recipients from engaging in disability discrimination. This means that a student at a public, magnet, or charter school has the right to be free from discrimination. 34 C.F.R. § 104.4(b)(1)(ii), (iii). Students with disabilities have protections against bullying and harassment from other students and from staff. 34 C.F.R. § 104.4; 34 C.F.R. § 104.33; 28 C.F.R. pt. 35; *see also* DOE-OCR, Dear Colleague Letter: *Responding to Bullying of Students with Disabilities* (Oct. 21, 2014), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf. Students who experience bullying or harassment may follow the OCR grievance procedure to protect their right to be free from disability discrimination. 34 C.F.R. § 104.7(b).

Youth may also receive protections from bullying and harassment under Title II of the ADA, which is enforced by the U.S. Department of Education Office of Special Education and Rehabilitative Services. DOE-OCR & Off. of Special Educ. & Rehab. Servs., *Prohibited Disability Harassment* (July 25, 2000), https://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html.

3. State Protections [§ 5.62]

Wisconsin state law prohibits discrimination of pupils based on physical, mental, emotional, or learning disability, among other things. Wis. Stat. § 118.13. Students experiencing this type of discrimination may file a grievance with the DPI. Wis. Admin. Code chs. PI 1, 9.

State law also provides that each district must have a policy on bullying that they distribute to all pupils and parents/guardians on a yearly basis. Wis. Stat. § 118.46(2). Districts may choose to write their own policy or use the DPI model policy. Wis. DPI, *Model Bullying Policy*, https://dpi.wi.gov/sspw/safe-schools/bullying-prevention (last visited May 6, 2021). State law also provides that a child can change districts because of bullying. Wis. Stat. § 118.51(3m).

State law does not define bullying, leaving it up to each district to define. State law also does not address protected groups, safeguards and supports, timelines for review and update of local policies, and staff training. This can lead to different policies and definitions between districts and staff confusion. ACLU of Wis., *It's Bigger Than Bullying*, https://www.aclu-wi.org/sites/default/files/wysiwyg/bully_book_0.pdf (last visited May 6, 2021); Stopbullying.gov, *Wisconsin Anti-Bullying Laws & Policies*, https://www.stopbullying.gov/resources/laws/wisconsin (last visited May 6, 2021).

D. McKinney-Vento Homeless Assistance Act [§ 5.63]

1. In General [§ 5.64]

The McKinney-Vento Homeless Assistance Act and McKinney-Vento Homeless Education Assistance Improvements Act of 2001 (McKinney-Vento) apply to recipients of federal financial assistance, such as public, charter, and magnet schools. *See* 42 U.S.C. §§ 11301–11435. The purpose of McKinney-Vento is to lessen educational disturbances and poor educational outcomes faced by homeless youth. Homeless youth experience high rates of mental illness, with studies showing both that mental health disorders are a predictor of future homelessness and that mental health issues are a result of homelessness. Homelessness Pol'y Rsch. Inst., *Mental Health Among Youth Experiencing Homelessness* (Aug. 19, 2019), https://socialinnovation.usc.edu/wp-content/uploads/2019/08/Youth-Mental-Health-Literature-Review-Final.pdf.

Wisconsin public schools identified about 20,000 youth who were homeless, unaccompanied, or both in the 2018–19 school year. Wis. DPI, *Education for Homeless Children and Youth (EHCY) Data*, https://dpi.wi.gov/homeless/data (last visited May 6, 2021). Homelessness disproportionately affects youth who are Black, Latino/a, or Latinx and youth who identify as LGBTQ+. Megan Gibbard Kline, *Centering Youth of Color & LGBTQ Young People in Efforts to End Homelessness* (Feb. 12, 2018), https://www.usich.gov/news/voices-of-youth-count-centering-youth-of-color-lgbtq-young-people-in-efforts-to-end-homelessness/.

The definition of "homeless" under McKinney-Vento is broad. Homeless children and youth include those who "lack a fixed, regular, and adequate nighttime residence." 42 U.S.C. § 11434a(2). The statute goes on to note that homeless children and youth under McKinney-Vento include but are not limited to the following:

1. Children and youth who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations; are living in emergency or transitional shelters; or are abandoned in hospitals;
2. Children and youth who have a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings;
3. Children and youth who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and
4. Migratory children (as defined in 20 U.S.C. 6399), who qualify as homeless because they are living in circumstances described in this definition.

Id.

2. Protections [§ 5.65]

Some important protections for homeless children and youth under McKinney-Vento include special provisions for enrolling in school without all the necessary documents, 42 U.S.C. § 11432(e)(3)(E)(i)(II), continued attendance at the child's school of origin if desired, 42 U.S.C. § 11432(g)(3)(A)(i), and transportation, 42 U.S.C. § 11432(e)(3)(E)(i)(III).

Under McKinney-Vento, districts must each designate a homeless liaison to help ensure that the district identifies and assists homeless children and youth who qualify for protections. 42 U.S.C. § 11432(g)(1)(J)(ii). The DPI keeps an updated list of homeless liaisons for every district in the state. Wis. DPI, *Homeless Liaison Directory*, https://dpi.wi.gov/homeless/liaisons (current as of Mar. 25, 2021).

3. Effect on Mental Health [§ 5.66]

McKinney-Vento's protections for homeless youth may have an important effect on mental health. When a homeless youth is able to maintain consistency by staying enrolled in school and attending their same school of origin where they attended before becoming homeless, this is a way for the youth to maintain some semblance of consistency during a chaotic time period in their life. This is especially important for youth with mental health issues who receive special education or school-based mental health services. Not losing out on educational time is also good for a child's mental health and self-esteem.

4. Complaint Process [§ 5.67]

When a district denies a child protections under McKinney-Vento, the parent has the right to file a complaint. 42 U.S.C. § 11432(g)(3)(E). The family must follow the district's complaint process. If that does not resolve the issue, then the parent or unaccompanied youth may send a request for resolution to the DPI's Superintendent's Office following the DPI's outlined complaint-resolution process. Wis. Admin. Code ch. PI 1.

X. Youth More at Risk for Legal and Mental Health [§ 5.68]

A. Adverse Childhood Experiences and Resiliency Scores [§ 5.69]

1. Adverse Childhood Experiences [§ 5.70]

When talking about youth and the long-term effects of difficult experiences in childhood, one often looks to the Adverse Childhood Experiences (ACE) Study. The ACE Study, conducted by the Centers for Disease Control and Prevention (CDC) and Kaiser Permanente, looked at long-term effects on adults who experienced potentially traumatic events during their first 18 years of life. The more adverse childhood experiences (ACEs) a youth suffers, the greater the likelihood of negative effects on the person as an adult. Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 Am. J. of Preventative Med. 245 (May 1998), https://www.ajpmonline.org/article/S0749-3797(98)00017-8/abstract. Many of the ACEs included in the study are linked to mental health, such as experiencing abuse or neglect, witnessing domestic abuse or substance abuse, divorce, or imprisonment of a parent. The higher the number of ACEs that someone

experienced as a child, the higher the likelihood of negative adult outcomes such as mental health disorders, injury, infectious and chronic disease, risky behaviors (substance abuse or unsafe sex), and limited opportunities (education, occupation, or income).

There are limitations of the study. The study participants were largely middle- or upper-class white people, all but leaving out people of color and people who grew up in poverty. Questions in the study did not include factors such as growing up under systemic oppression (e.g., white supremacy, homophobia, ableism, or xenophobia), all of which have an effect on adult outcomes. Paul Lanier, UNC Sch. of Soc. Work, Jordan Inst. for Fams., *Racism Is an Adverse Childhood Experience* (ACE) (July 2, 2020), https://jordaninstituteforfamilies.org/2020/racism-is-an-adverse-childhood-experience-ace/.

2. Resiliency [§ 5.71]

When talking about ACEs, it is important to also talk about resiliency. Resiliency factors can help mitigate ACEs and help people with significant ACE scores know that all is not lost. There are factors that can help them overcome childhood trauma and escape poor outcomes as adults. Resiliency factors include close relationships with caregivers or other caring adults, parental resilience, caregiver knowledge and use of positive parenting skills, possession of a sense of purpose (through faith, culture, identity), individual competencies (problem-solving skills, self-regulation, autonomy), opportunities to connect socially, practical and available support services for parents and families, and communities that value people and support health and personal growth. Kerry Jamieson, Ctr. for Child Counseling, *Resilience: A Powerful Weapon in the Fight Against ACEs* (Aug. 2, 2018), https://www.centerforchildcounseling.org/resilience-a-powerful-weapon-in-the-fight-against-aces/.

B. Minors as Victims of Crime, Including Teen Dating Violence, Sexual Assault, and Human Trafficking [§ 5.72]

1. Minors as Victims of Crime [§ 5.73]

When minors are victims of crime, it is not uncommon for their medical or mental health records to be requested by the defense. As a victim of crime, the minor may need an attorney to assist in protecting their records, among other reasons. The parent or guardian of a minor victim of crime is considered the statutory victim, unless that individual is acting contrary to the minor's interests. Wis. Stat. § 950.02(4)(a)2. If the parent is not acting in the minor's interests, the court may appoint an attorney to represent the minor's interests, though a court appointment is not required for a minor victim to have an attorney represent them.

Outside of a court appointment, whether representation of a victim is directly for the minor or for the parent as the statutory victim depends on the attorney's assessment of the minor's age and capacity. See sections 5.4 and 5.13, *supra*, on privilege and JIPS and delinquency for more information on assessing the capacity of minors and further distinction of minors under 14 years old and minors 14 years old and older. In the criminal context, especially in cases of sexual assault, victim mental health records are frequently requested under the *Shiffra-Green* line of case law. *See State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), *abrogated by State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298. *But see State v. Johnson*, 2020 WI App 73, 394 Wis. 2d 807, 951 N.W.2d 616 (review granted) (holding that 2020 Marsy's Law constitutional amendment grants crime victims standing to oppose, and to make arguments supporting their opposition to, a defendant's *Shiffra-Green* motion). Disclosure of victim mental health records must be balanced against protecting the confidential records. For purposes of mental health records being disclosed in a criminal case, the parent or guardian is generally accepted by the court to consent to the waiver of privilege unless the court has found the parent is not acting in the child's interest.

2. Teen Dating Violence and Sexual Assault [§ 5.74]

Many people see domestic abuse and sexual assault as only affecting adults. Teen dating violence and sexual assault are often unknown or taboo topics. Reporting and disclosure are low for both forms of abuse, but data shows that youth, especially teens, experience both dating violence and sexual assault at significant rates in Wisconsin:

- 20% of dating females reported being sexually assaulted by a partner within the last 12 months.
- 10.7% of dating females reported being physically assaulted by a dating partner within the last 12 months.
- 19.9% of students reported being the victim of at least one act of sexual assault or sexual coercion. Rates were considerably higher for high schoolers who identified as LGBT, female, having a physical disability or chronic health condition, and/or experiencing food insecurity.
- Of the students who experienced sexual assault or coercion:

- 61% reported experiencing multiple incidents of abuse,
- 76.2% reported experiencing anxiety during the past 12 months,
- 54% reported experiencing depression during the past 12 months, and
- 20.2% reported attempting suicide during the past 12 months.

Katherine McCoy, Wis. DPI, *2019 Wisconsin Youth Risk Behavior Survey Summary Report* (2020), https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/YRBS_2019_Summary_Report_DPI_Web_Version.pdf.

3. Human Trafficking [§ 5.75]

Human trafficking is another underreported issue, so there is no way to know how many youth in Wisconsin are victims of sex or labor trafficking each year. Wisconsin DCF data shows that the number of reported and authenticated sex trafficking cases in the state is at least in the hundreds and disproportionately affects Wisconsin youth who are Black. Wis. DCF, *Reports of Child Sex Trafficking Allegations and Substantiations to Child Protective Services* (Dec. 2018), https://dcf.wisconsin.gov/files/aht/pdf/aht-report.pdf. Youth who identify as LGBTQ are similarly victimized at disproportionate rates. Polaris Project, *Sex Trafficking and LGBTQ Youth*, https://polarisproject.org/wp-content/uploads/2019/09/LGBTQ-Sex-Trafficking.pdf (last visited May 6, 2021).

Accurate data on missing and murdered indigenous women and children in Wisconsin, some of whom may be victims of trafficking, does not exist, but the problem is dire enough that the state attorney general recently created a taskforce dedicated to addressing the issue. News Release, Wis. Dep't of Just., *AG Kaul Announces Missing and Murdered Indigenous Women Task Force* (July 2, 2020), https://www.doj.state.wi.us/news-releases/ag-kaul-announces-missing-and-murdered-indigenous-women-task-force.

Data is similarly difficult to come by for labor trafficking of youth, but Wisconsin law enforcement agencies have notice an increase in its prevalence. Wis. Dep't of Just., *A Baseline Assessment of Human Trafficking in the State of Wisconsin* (Sept. 6, 2013), https://www.doj.state.wi.us/sites/default/files/2013-news/wisconsin-human-trafficking-assesment-2013.pdf.

4. Relationship to Mental Health [§ 5.76]

a. In General [§ 5.77]

Youth with existing mental health issues are at increased risk of victimization for crimes like teen dating violence, sexual assault, and human trafficking. Some youth experience mental health issues as a result of experiencing abuse, including depression, anxiety, and post-traumatic stress disorder.

b. Intersection Between Teen Dating Violence, Sexual Assault, and Human Trafficking [§ 5.78]

Some youth experience multiple forms of victimization, either by the same person or multiple people. Sex trafficking of youth commonly begins when the youth are wooed by and think they are in a dating relationship with the trafficker. The trafficker becomes abusive and then traffics the youth. As stated above, sexual assault is more common than physical abuse in teen dating violence relationships.

c. Legal Issues [§ 5.79]

(1) Contracting to Enter a Shelter [§ 5.80]

Under a statute enacted in 2019, people who are 17 years old are eligible to contract to enter shelters in Wisconsin if they are (1) unaccompanied according to the definition in the federal McKinney-Vento Homeless Assistance Act, and (2) not under the supervision of a government agency listed in the statute. Wis. Stat. § 48.9875. The shelter can be a homeless shelter, a domestic violence shelter, or a different type of shelter facility. This statute is particularly important for youth whose parents or caregivers are absent or are complicit in the youth's abuse.

(2) Restraining Orders and Injunctions [§ 5.81]

Wisconsin has a two-step process for civil protection orders, with victims obtaining temporary relief through an ex parte restraining order and then more long-lasting protection through an injunction.

There are four types of restraining orders in Wisconsin: harassment, child abuse, domestic abuse, and individual-at-risk. Youth victims of teen dating violence, sexual assault, or human trafficking in Wisconsin generally meet the requirements to file for a harassment restraining order. Wis. Stat. § 813.125. A harassment restraining order may be filed by a petitioner who is a minor. *Id.* Children and youth may also file for a child abuse restraining order. Wis. Stat. § 813.122. The respondent for both harassment and child abuse restraining orders may themselves be a minor. Wis. Stat. §§ 48.14(10), 757.69(1)(g), 813.125(5)(a)2. A domestic abuse restraining order is only available when both the petitioner and the respondent are adults. Wis. Stat. § 813.12(1)(am). An individual-at-risk restraining order is only available for an adult petitioner. Wis. Stat. § 813.123(6)(b).

The process to obtain a restraining order and injunction can be taxing on a youth's mental health. It is often difficult for the youth to relive the trauma when writing out a statement for the restraining order petition. Testifying during the injunction hearing and potentially being in the respondent's presence is also fear inducing and anxiety provoking. The process may be easier if the youth receives supportive services throughout the proceeding by a therapist, a domestic abuse or sexual assault advocate, or both.

Practice Tip. When seeking a restraining order for a youth, it is important to seek their input and get their perspective. When a parent or guardian wants a restraining order in place, but the youth does not, actual enforcement of the order is problematic and sometimes impossible if the youth is not disclosing contact by the respondent.

(3) "Safe-Harbor" Legislation [§ 5.82]

Wisconsin legislators introduced several "safe-harbor" bills over past sessions that would prohibit charges of prostitution for minors. As of the publication of this book, these bills have not passed. The idea behind safe-harbor legislation is that children cannot consent and should not be charged for the abusive choices that their trafficker commits.

XI. Conclusion [§ 5.83]

Knowledge of how to effectively represent Wisconsin's youth with mental health concerns is especially important because youth are the future of our state. As mental health continues to lose its stigma and be more openly discussed, particularly among youth, attorneys must be able to effectively and compassionately represent youth clients with mental health issues. This chapter serves as a starting point for attorneys, but attorneys representing youth with mental health concerns should not hesitate to consult with outside professionals if there are any unanswered questions or if the attorney seeks to have a greater understanding of the issues their client is facing.

XII. Resources [§ 5.84]

Listed below are some organizations that attorneys might want to consult for information, guidance, or both when representing youth with mental health concerns. All websites were last visited on May 6, 2021.

- National Alliance on Mental Illness|Wisconsin, https://namiwisconsin.org
- Disability Rights Wisconsin, https://www.disabilityrightswi.org
- Wisconsin Department of Health Services, https://www.dhs.wisconsin.gov
- Wisconsin Department of Public Instruction, https://www.dpi.wi.gov
- ABC for Health, Inc., https://www.safetyweb.org
- Kids Forward, https://kidsforward.org
- Mental Health America of Wisconsin, http://www.mhawisconsin.org
- Covering Wisconsin, https://www.coveringwi.org
- Disproportionality Technical Assistance Network, http://www.thenetworkwi.com

Chapter 6
Mental Health and Criminal Law

Tara Teesch

Note. The author has chosen to use gender-neutral pronouns (e.g., "they," "them," "their") in the writing of this chapter. Mental health issues affect people regardless of sex or gender identity.

I. General Considerations in Representing Mentally Ill Defendants [§ 6.1]

The diagnosis of mental illness for a defendant does not necessarily mean that the condition will affect or have relevance to the criminal case. Certainly, mental illness can often be a major driver of behavior that results in criminal charges. Mental illness can also affect a defendant's ability to consult with counsel and participate in criminal proceedings. This chapter contemplates situations in which a defendant's mental illness bears on the criminal case.[5]

A defendant with mental illness is especially vulnerable. Attorneys representing mentally ill defendants must proceed with special care. The interaction can be particularly challenging, and attorneys would do well to set any expectations of a routine client consultation aside. No matter how difficult the interaction, defendants have rights that deserve full attention and zealous representation.

The following suggestions, advice, and anecdotes are offered to attorneys for consideration as they represent defendants with mental illness:

1. Be prepared for a potentially emotional exchange. Defendants symptomatic of mental illness may present with sadness, anger, mania, aggression, and frustration. Defendants with mental illness symptoms can also be withdrawn and uncommunicative. How these symptoms manifest can change through the course of their illness and through the course of the representation. Within reason, allow defendants experiencing these symptoms to express themselves and really listen to them. Establish trust with clients by meeting them at their mental, emotional, and cognitive level.

2. When representing mentally ill defendants, carve out extra time for client meetings and consultations. Be prepared to have more conversations or meetings than "normal" with defendants to discuss the case and meet the client's representation goals. Consider including loved ones or case management professionals in the scheduling of client meetings and court dates to help keep them on track.

   Caution. Include others only with client authorization and only if inclusion of these parties will not adversely affect the case or the client. When discussing the case, address the facts honestly and directly, while offering support and reassurance. Listen carefully to what defendants and clients have to say.

3. Attorneys representing defendants in criminal cases are advocates for the positions of their clients, and this remains true for those clients with mental illness and those who are symptomatic of mental illness. Resist the urge to become a "best interests" attorney rather than an adversary, unless the appointment is as guardian ad litem or other "best interests" representative. An attorney as adversary defense counsel for defendants in criminal cases should not substitute the attorney's judgment for that of the client's or defendant's. The narrow exception to this is in raising competency issues, discussed later in this chapter.

4. Do not assume a lack of intelligence or comprehension in mentally ill defendants but do recognize that it is likely that they will process information differently. The presence of mental illness or mental illness symptoms does not mean that intelligence is lacking. Sometimes mental illness does equate with cognitive deficits, but this is not always the case.

5. Get a baseline level of understanding of the defendant's condition and how symptoms of that condition manifest in a defendant's behavior. Consult the *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*, a publication by the American Psychiatric Association that defines and classifies mental disorders. Be prepared to consult and hire experts to assist in meeting the objectives of the case.

6. Obtain authorizations to release information from the defendant and the defendant's treatment providers to gain access to relevant treatment records and mental health diagnosis history.

II. Mental Health and the Criminal Justice System [§ 6.2]

According to a June 2017 U.S. Bureau of Justice Statistics Special Report, nearly 1 in 7 state and federal prisoners and 1 in 4 jail inmates met criteria for "serious psychological distress" in the 30 days preceding the survey. Comparatively, 5% of the general population met these criteria. See Jennifer Bronson & Marcus Berzofsky, *Indicators of Mental Health Problems Reported by Prisoners and Jail*

Inmates, 2011-12, RTI International. The same survey found that a significant number of prisoners and jail inmates had been previously told they had a mental disorder—37% of prisoners and 44% of jail inmates.

The most recent Wisconsin Department of Corrections budget request (for 2019–21) included statistics regarding the mental illnesses present in prison inmate populations. Over 40% of inmates at Racine Correctional Institution had a mental health condition and nearly 8% had a mental illness that could be categorized as severe. The prevalence of mental illness was noted to be higher in prison inmate populations, with just over 9% of inmates having "serious mental illness" versus just over 4% of the general population. The budget request noted the "high proportion" of "mentally ill inmates" at Columbia Correctional Institution. *See* Wis. Dep't of Corr., *Agency Budget Request* (Sept. 17, 2018), https://doa.wi.gov/budget/SBO/2019-21%20410%20DOC%20Budget%20Request.pdf. These numbers begin to offer a glimpse into the scope of mental illness present in defendants generally. An article in The Guardian in 2018 noted that "jails and prisons have become the nation's de facto mental healthcare providers," as the number of mental institutions has greatly diminished. *See* Alisa Roth, *A "Hellish World": The Mental Health Crisis Overwhelming America's Prisons*, Guardian (Mar. 31, 2018).

For mentally ill defendants, the typical sentencing responses to their crimes are to incarcerate in jails or prisons or supervise on probation or extended supervision. There is, however, increasing recognition of the value of specialty treatment courts and implementation of these courts throughout counties in Wisconsin. Treatment courts are a collaborative effort among criminal justice stakeholders, and in the case of mental health courts, local public and private mental health services agencies. The goal of mental health treatment courts is to treat and stabilize defendants while holding them accountable for their criminal behavior, with the aim of reducing recidivism. See chapter 10 of this book for an in-depth discussion of treatment courts.

III. Ethical Duties to Mentally Ill Clients [§ 6.3]

The Wisconsin Supreme Court rules address an attorney's ethical obligations to clients with mental illness. Wisconsin SCR Ch. 20 describes the condition of the client as one of *diminished capacity*—a broader stroke that encompasses states or conditions of persons beyond "mental impairment," such as "minority" or other reasons. This rule directs that clients with diminished capacity should be maintained in a normal client-lawyer relationship to the extent that is "reasonably possible." *See* SCR 20:1.14.

ABA Comment [6] to SCR 20:1.14 notes factors that should be considered when assessing the extent of a client's diminished capacity. Attorneys should assess the client's capacity for the following: (1) "the … ability to articulate reasoning leading to a decision," (2) "the variability of state of mind and ability to appreciate consequences of a decision," (3) "the substantive fairness of a decision," and 4) "the consistency of a decision with the known long-term commitments and values of the client." *See* SCR 20:1.14, ABA cmt. [6].

Clients who have mental illness or "mental impairment" as SCR Ch. 20 defines it will have varying degrees of mental ability and cognition. The degree of impairment will vary from client to client and will show up differently for individual clients depending on the current management and severity of their condition. Not all clients with a diagnosis of schizophrenia will present the same. Not all clients with a diagnosis of bipolar disorder will present the same. There will be widely varying abilities of clients with the same kind of diagnosis.

Attorneys should anticipate fluctuations in a mentally ill client's ability to make decisions about the representation. A client's ability to process information might change throughout the representation, depending on the severity of the condition and how it is being managed. The rule acknowledges that clients with diminished capacity are not automatically incompetent nor prohibited from participating in a "normal" attorney-client relationship. *See* SCR 20:1.14, ABA cmt. [1]. Implicit in this acknowledgement is the idea that attorneys must meet clients at the clients' intellectual, emotional, and cognitive level, navigating the representation from that place.

Practice Tip. In the context of mental health and criminal law, the attorney's role for clients is as an advocate in the adversary system. Attorneys take on representation of clients in criminal cases to ultimately assist them in doing what they want to do in the case. A defense attorney in a criminal case does not substitute the attorney's judgment for the judgment of the client. This gets complicated when representing clients with mental illness, especially if they are actively symptomatic or have obvious cognitive challenges. The urge to act in the client's best interest is strong, even when the attorney role is as an adversary. Remember that adversarial representation should aid a client's agency in making decisions about how to proceed in the criminal case. Presence of mental illness, even with active symptoms or cognitive delays, does not mean a complete absence of ability to take in information and make decisions. Unless the mental illness has rendered the client greatly incapacitated, assume the client retains some degree of ability for deliberative choice.

In limited situations, attorneys must act in the case to raise the mental impairment of clients as an issue, even over the client's objections. Raising competency is one such situation and is discussed later in this chapter. The Wisconsin Supreme Court rules consider another type of situation in which "protective action" can be taken by attorneys on behalf of clients. SCR 20:1.14(b) addresses circumstances when attorneys may take "protective action" for clients. Attorneys may take protective action when it is reasonably believed

that the client (1) has diminished capacity; (2) is at risk of substantial physical, financial, or other harm unless protective action is taken; and (3) cannot adequately act in the client's own interest. *See* SCR 20:1.14(b).

Protective action can include conferring with "individuals or entities" that are positioned to act to protect the client. SCR 20:1.14, ABA Comment [5] offers further detailed examples of the kinds of action that can be taken, including specifying that "individuals and entities" can include a client's family and mental health groups and agencies. The rule allows guardians ad litem, conservators, or guardians to be sought to be appointed "in appropriate cases" if a legal representative has not otherwise been appointed. *See* SCR 20:1.14(b). In deciding whether to pursue such appointments, a lawyer should consider whether the appointments would be "more expensive or traumatic for the client than circumstances in fact require." *See* SCR 20:1.14, ABA cmt. [7].

Attorney-client privilege continues to apply while seeking protective action on behalf of the client. SCR 20:1.14(c) provides that "[i]nformation relating to the representation of a client with diminished capacity is protected under SCR 20:1.6." Under SCR 20:1.14(c), a lawyer taking protective action under SCR 20:1.14(b) is "impliedly authorized … to reveal information about the client, but only to the extent reasonably necessary to protect the client's interest." When taking protective action, a lawyer is permitted to disclose privileged information relating to the representation "only to the extent reasonably necessary to protect the client's interest." *See* SCR 20:1.14(c).

ABA Comment [8] to SCR 20:1.14 cautions that revealing diminished capacity of a client "could adversely affect the client's interest." This comment emphasizes the application of attorney-client privilege even when taking protective action. An attorney can reveal privileged information if authorized by the client, and, under SCR 20:1.14(b), an attorney may make "necessary disclosures" even if not authorized by the client in order to take protective action for them. Such disclosures are limited under SCR 20:1.14(c) and are allowed "only to the extent reasonably necessary to protect the client's interests." Comment [8] acknowledges that attorneys considering the necessity and extent of protective action find themselves in "unavoidably difficult" positions as to the representation.

ABA Comment [9] to SCR 20:1.14 contemplates the provision of "emergency legal assistance" to a *person* (not a client) with "seriously diminished capacity." Emergencies are identified as situations when "the health, safety or a financial interest of a person … is threatened with imminent and irreparable harm." Attorneys may take emergency legal action "even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer." ABA Comment [9] further directs that attorneys should not take emergency legal assistance unless they "reasonably believe" that the person has no other "lawyer, agent or other representative." Attorneys should provide emergency legal assistance "only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm." Attorneys taking emergency legal action have the "same duties under these Rules as the lawyer would with respect to a client." *See* SCR 20:1.14, ABA cmt. [9].

ABA Comment [10] to SCR 20:1.14 directs attorneys taking emergency legal action to "keep the confidences of the person as if dealing with a client," allowing disclosure "only to the extent necessary to accomplish the intended protective action." Attorneys taking emergency legal action should disclose their role to other involved tribunals or attorneys and act "as soon as possible" to "regularize the relationship or implement other protective solutions." The comment implicitly encourages attorneys not to seek compensation for taking emergency legal action. *See* SCR 20:1.14, ABA cmt. [10].

SCR 20:1.4 describes the principles and ethics in communicating with clients. The rule requires attorneys to "promptly inform" clients, "reasonably consult" with clients, and "promptly comply with reasonable requests" and contains other directives. ABA Comment [6] to this rule acknowledges the challenges of communication with clients who have diminished capacity, noting that "fully informing the client may be impracticable" when a client has such a condition. As contemplated by SCR 20:1.4, "fully informing" the client means that the "information provided is that appropriate for a client who is a comprehending and responsible adult." *See* SCR 20:1.4, ABA cmt. [6].

SCR 20:1.16 describes the rules and ethics involved in declining or terminating representation of clients. ABA Comment [6] to this rule contains guidance for lawyers dealing with clients who present with diminished capacity. Specifically, the discharge of a lawyer by a client with "severely diminished capacity" is addressed. A client with severely diminished capacity may lack the "legal capacity" to terminate the attorney-client relationship, and the rule anticipates that the discharge of representation may be "seriously adverse to the client's interests." In response to such an attempted discharge and in anticipation of adverse consequences to the client as a result, the lawyer is directed to "make special effort to help the client consider the consequences (of discharge) and may take reasonably necessary protective action as provided in Rule 1.14." *See* SCR 20:1.16, ABA cmt. [6].

Note. Although not a criminal case, *Kainz v. Ingles*, 2007 WI App 118, 300 Wis. 2d 670, 731 N.W.2d 313, considered the parameters of SCR 20:1.14. The *Kainz* court recognized that SCR 20:1.14 is not a "statutory standard for competency." Rather, SCR 20:1.14 instructs attorneys on their ethical obligations to clients with diminished capacity. *See Kainz*, 2007 WI App 118, ¶ 46, 300 Wis. 2d 670.

IV. Competency to Participate in the Criminal Legal Process [§ 6.4]

A. Raising Competency Issues—Wis. Stat. § 971.13 [§ 6.5]

A defendant's ability to understand the criminal proceedings and assist in the defense is fundamental to due-process rights. Wis. Stat. § 971.13(1) provides that "no person who lacks substantial mental capacity to understand the proceedings or assist in their own defense can be tried, convicted, or sentenced" in criminal matters. Note that the statute directs that competency be assessed in two different areas: (1) the capacity to understand the proceedings, and (2) the capacity to assist in the defense. A lack of substantial capacity to understand one or both of these areas puts competency at issue in the matter.

Example. A defendant could express an understanding of the roles of the judge, prosecutor, and defense counsel in criminal proceedings and what the plea options are but at the same time could lack substantial mental capacity to assist in the defense as a result of impairments in communication and orientation. Competency is at issue in this scenario. Conversely, a defendant could have the capacity to communicate their version of events and relevant facts relevant, thereby assisting the defense, but lack substantial mental capacity to understand the nature of criminal proceedings and the parties' roles. Competency is at issue in this scenario as well. If there are substantial deficits in both areas, competency is certainly at issue in the matter.

In *State v. Leach*, 122 Wis. 2d 339, 344, 363 N.W.2d 234 (Ct. App. 1984) (citation omitted), *rev'd on other grounds*, 124 Wis. 2d 648, 370 N.W.2d 240 (1985), the court provided the following test for competency: "[The] test for competency is whether the accused 'has sufficient present ability to consult with their lawyer with reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings against him.'" Competency can be raised in criminal proceedings and probation revocation proceedings before an administrative law judge. If there is reason to doubt a defendant's competency during the probation revocation process, the revocation proceedings are suspended until a determination about competency is made before the circuit court in which the probationer was sentenced. *See State ex rel. Vanderbeke v. Endicott*, 210 Wis. 2d 502, 563 N.W.2d 883 (1997).

A defendant cannot be made to proceed in a criminal matter "so long as the incapacity endures." *See* Wis. Stat. § 971.13(1). The presence of incompetency does not necessarily mean that the criminal proceedings end and the charges are dismissed. Raising competency pauses the matter, allowing for an evaluation of the defendant's capacity to understand the proceedings and assist in their defense.

Practice Tip. If an attorney, including a prosecutor, suspects that a defendant is incompetent, the issue of competency must be raised with the court, even over a defendant's objections. Raising competency is a matter of affirmative duty to a client and not a matter of strategy. Defendants and their attorneys are not permitted to waive inquiry into competency issues. *See State v. Johnson*, 133 Wis. 2d 207, 395 N.W.2d 176 (1986). Failure to raise competency when it is in doubt is deficient legal practice. *See State v. Haskins*, 139 Wis. 2d 257, 407 N.W.2d 309 (Ct. App. 1987). A court must raise the issue of competency unilaterally if counsel does not. *See Pate v. Robinson*, 383 U.S. 375 (1966). Competency issues can be raised at any stage of the criminal process and can be raised more than one time in the same proceeding if there is reason to doubt competency once again. *See Leach*, 122 Wis. 2d at 344.

To raise competency issues, an attorney is granted a limited and narrow exception to break attorney-client privilege. If competency issues are suspected, an attorney must notify the court but is not required to reveal all the reasons that persuade counsel to raise the issue. *See State v. Meeks*, 2003 WI 104, 263 Wis. 2d 794, 666 N.W.2d 859. As a practical matter, although counsel is limited in what can be offered to protect client communication, enough must be revealed to move the court for a competency exam.

To maintain attorney-client privilege as much as possible while successfully moving the court to order a competency evaluation, it may be helpful to refer to the allegations contained in the criminal complaint if they indicate potential issues with competency. Referring to information contained in the complaint highlights information that is already known to the court and is not derived solely from attorney-client communication. In situations in which the complaint offers no facts indicating issues with competency, an attorney should be as general as possible in raising the issue. The attorney should refer to the statutory language in Wis. Stat. § 971.13(1) and emphasize that raising competency is required when the attorney believes it to be an issue. Remind the court that attorneys are duty bound to raise competency issues as they present in clients and defendants.

B. How Issues of Competency May Look During the Representation [§ 6.6]

How might issues of competency show up in the representation? They could manifest as deficiencies or limitations in defendants' communication generally. If the incompetency is rooted in an inability to understand the proceedings, the defendant may present as not

understanding the roles of the parties in the criminal process, their rights when accused of a crime, their plea options, or what happens at the various stages of criminal proceedings.

If the incompetency is rooted in an inability to assist in the defense, the defendant may present with theories of defense that are delusional or illogical. The defendant may be so symptomatic of mental illness or other mental incapacities that they do not possess the ability to relay a coherent or understandable narrative of their version of events.

Competency does not require an in-depth or perfected understanding of proceedings or a complete and thorough ability to assist in defenses. The definition of *competency* contemplates a "substantial" lack of understanding. From this it follows that basic levels of understanding of the proceedings and minimal ability to assist in defense could be enough for competency. Every case and every defendant is different. Competency must, by its nature, be assessed on a case-by-case basis.

C.
Competency Proceedings—Wis. Stat. § 971.14(1r) [§ 6.7]

Procedures for competency evaluations and later hearings to assess and determine competency are described in Wis. Stat. § 971.14. If the court is satisfied that the issue of competency has been sufficiently raised, or has reasons on its own to doubt competency, the court must order a competency evaluation. A probable cause determination is required before ordering a competency examination. Probable cause can be based on the complaint or preliminary hearing bindover. The defendant has the right to challenge a finding of probable cause with a limited evidentiary hearing. *See* Wis. Stat. § 971.14(1r)(c).

Practice Tip. Wisconsin Circuit Court form CR-205 is the Order For Competency Examination by the Department of Health Services. It includes sections to list the defendant's name, address, and telephone number. With client consent, it can be useful to supplement this contact information with alternative ways for the examiner to get in touch with the defendant. Supplemental information could include additional phone numbers or addresses personal to the defendant or the phone numbers or addresses of the defendants' trusted family members, caretakers, guardians, or case workers. This can ensure that the defendant connects with the examiner and makes the necessary examinations.

D.
Competency Examinations—Wis. Stat. § 971.14(2) [§ 6.8]

Competency evaluations can be done on an inpatient or outpatient basis. *See* Wis. Stat. § 971.14(2)(am). A court can order one or more mental health examiners to assess the defendant and can commit a defendant to a "suitable" mental health facility for the examination if an inpatient examination is deemed necessary. *See* Wis. Stat. § 971.14(2)(a). If a client is released from custody on a bond, an outpatient examination to assess competency is the starting point. *See* Wis. Stat. § 971.14(2)(b).

Most often, a court orders that the defendant is to be examined by the Wisconsin Department of Health Services (DHS). The DHS has the authority to determine where the examination will take place, who will perform it, and whether the examination will be inpatient or outpatient. An evaluation of a defendant in a jail is considered an "outpatient" examination. *See* Wis. Stat. § 971.14(2)(am).

Defendants who are out of custody typically will be ordered to participate in outpatient examinations, but that determination is ultimately up to the DHS. The DHS could decide that out-of-custody defendants require inpatient examinations for a variety of reasons. The DHS might favor inpatient examinations if the defendant is not cooperative with the outpatient examination process, if the defendant is not taking medication as prescribed, or if environmental factors make an outpatient examination challenging. For example, an inpatient examination may be favored if the defendant has substance-use-disorder issues that could obscure an assessment of their mental health.

If an inpatient examination is ordered, the competency evaluation must be completed and a report provided to the court within 15 days after the examination is ordered or within 15 days after the arrival of the defendant at the inpatient facility. *See* Wis. Stat. § 971.14(2)(am), (c). The facility or the examiner can request one 15-day extension for good cause. *See* Wis. Stat. § 971.14(2)(c). The county sheriff is responsible for transporting jailed defendants who are ordered to undergo inpatient examinations. *See* Wis. Stat. § 971.14(2)(d).

Note. For incarcerated defendants who have been ordered to undergo inpatient evaluations, it is not unprecedented for the client to remain in jail for several months waiting to be transferred to a facility for the examination.

If an outpatient examination is ordered, the competency evaluation must be completed and a report provided to the court within 30 days after the examination is ordered. *See* Wis. Stat. § 971.14(2)(c).

Note. Outpatient examinations often are arranged to be conducted at local county jails. Understandably, this can be concerning for clients who might fear they are returning to the jail. Outpatient examinations occur at offices or meeting rooms at the jail, and it does not mean that the client is being returned to custody for the examination. Attorneys should assure out-of-custody clients that having examinations at the jail does not mean a return to custody.

Competency examiners are directed to personally observe the defendant, and the defendant's treatment records must be made accessible to the examiner. *See* Wis. Stat. § 971.14(2)(e).

The defendant, either self-represented or through counsel, and the district attorney can choose their own experts to conduct competency examinations. The parties' experts are to be given "reasonable access" to the defendant to conduct the examination. *See* Wis. Stat. § 971.14(2)(g).

The patient-physician privilege of Wis. Stat. § 905.04 does not apply in examinations for competency. *See Simecek v. State*, 243 Wis. 439, 10 N.W.2d 161 (1943).

Attorneys for defendants in Wis. Stat. ch. 971 proceedings will benefit from having a client's treatment records, and Wisconsin law allows counsel to access these records without the need for written releases. Wis. Stat. § 51.30(4)(b)11. authorizes defense counsel to have access to treatment and registration records for defendant-clients in Wis. Stat. ch. 971 competency proceedings "at any time," without written consent from defendants. Attorneys may encounter facilities and treatment providers that insist on written releases, but this statute provides that records are to be released to counsel "without informed written consent." *See* Wis. Stat. § 51.30(4)(b).

E. Competency Reports—Wis. Stat. § 971.14(3) [§ 6.9]

Wis. Stat. § 971.14(3) details the required contents of competency examiners' reports. The report is to detail the nature of the examination and the persons, records, and tests consulted and used to reach a conclusion. The report is to contain diagnoses and an opinion on "the defendant's present mental capacity to understand the proceedings and assist in his or her defense." *See* Wis. Stat. § 971.14(3)(c). If the defendant is incompetent, the examiner must provide an opinion on whether competency can be restored with treatment in the statutory time frame.

The examiner should speak to whether competency restoration treatment should be provided on an inpatient or outpatient basis. *See* Wis. Stat. § 971.14(3)(d). Inpatient treatment occurs at state mental health facilities. Outpatient treatment can occur in the community with community-based programs; jails are considered outpatient for these purposes. The examiner should opine on the kind of treatment needed to attempt to restore the defendant to competency. Competency restoration could involve provision of educational information to the defendant about the basics of the criminal legal process and what defendants' rights and options are in that process. Competency restoration may involve medication in certain instances, provided legal standards are met as discussed below.

Until June 2019, Wis. Stat. § 971.14(3)(dm) was the law of the land regarding involuntary medication orders to restore a defendant's competency. Wis. Stat. § 971.14(3)(dm) provided that, if "sufficient information was available," the examiner must offer an opinion on whether the defendant requires medication and treatment and whether the defendant is competent to refuse medication and treatment. *See* Wis. Stat. § 971.14(3)(dm). A finding that a defendant is "not competent to refuse medication or treatment" first required that the examiner explain or attempt to explain to the defendant the advantages and disadvantages of and alternatives to accepting medication and treatment. *See* Wis. Stat. § 971.14(3)(dm). If the examiner found that due to mental conditions or substance-use-disorder issues, the defendant was incapable of expressing an understanding of the advantages and disadvantages of treatment or was "substantially incapable" of applying the advantages and disadvantages of the recommended treatment to their condition, the examiner would conclude that the defendant was not competent to refuse medication or treatment. If the court accepted this conclusion, it could order the defendant to receive involuntary medication and treatment for the condition, against the defendant's objections. *See* Wis. Stat. § 971.14(3)(dm).

In *State v. Fitzgerald*, 2019 WI 69, 387 Wis.2d 384, 929 N.W.2d 165, the Wisconsin Supreme Court held that Wis. Stat. § 971.14(3)(dm) was unconstitutional as violative of a defendant's substantive-due-process rights.

With the holding in *Fitzgerald*, an involuntary medication order to restore a defendant's competency must meet the factors articulated in *Sell v. United States*, 539 U.S. 166 (2003). There are four factors that must be considered and met per *Sell*. To order that a defendant can be given medication against their will (an involuntary medication order), the court must find the following:

1. "[I]mportant governmental interests are at stake." *Id.* at 167.

Comment. As a practical matter, this is going to go to consideration of the crimes charged and the level of governmental interest in seeing the prosecution through. For example, it is recognizable that the government would have an important interest in prosecuting a homicide case. But consider the following: Is it a governmental interest of importance when the charged crime is a low-level misdemeanor with merely months in local jail as the maximum possible sentence? Does seeing the prosecution through on a low-level charge rise to the level of an important governmental interest that outweighs a defendant's personal liberty to be free from involuntary medication?

2. "[F]orced medication will significantly further" the state's interest in prosecuting the crimes charged and "medication is substantially likely to render the defendant competent to stand trial and substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a defense." *Id.*

3. "[I]nvoluntary medication is necessary" to further the important governmental interest in prosecuting the crime charged and "alternative, less intrusive treatments are unlikely to achieve substantially the same results." *Id.*

4. "[A]dministering the drugs is medically appropriate" for the defendants' condition. *Id*. The medications sought to be administered to the defendant involuntarily must be appropriate for their health condition and not used solely to ease the prosecution of the defendant.

The holding in *Fitzgerald* is a new way forward in determining the appropriateness of involuntary medication orders to restore competency. Previously, the court only had to find that a defendant was incapable of expressing an understanding of the advantages and disadvantages of medication or incapable of applying that understanding to their situation. The factors of Wis. Stat. § 971.14(3)(dm) were devoid of considerations of a defendant's personal health, the efficacy and appropriateness of medication, and the governmental interest involved in prosecuting a matter. The *Fitzgerald* case, and its adoption of the *Sell* factors, provide substantial ground to move from involuntary medication orders as common and routine to case-by-case and individual considerations that are intended to make involuntary medication orders "rare." *Sell*, 539 U.S. at 167.

On February 25, 2021, District 4 of the Wisconsin Court of Appeals decided *State v. Green*, 2021 WI App 18, 396 Wis. 2d 658, 957 N.W.2d 583 (review granted), further detailing the burdens of proof, required evidence, and findings a circuit court must make before ordering involuntary medication to restore a defendant's competency. The *Green* court emphasized that the state must show that a defendant's particular circumstances and health are considered by physicians who are recommending involuntary medication. In *Green*, the court of appeals held that that the state did not meet its burden of proof, because the psychiatrist recommending involuntary medication did not consider Green's particular circumstances or how he might react to the medication being recommended and did not review Green's medical and treatment records or evaluate Green for the appropriateness of the recommended involuntary medication. The court of appeals held that the state did not meet its burden of proof as to the second and fourth *Sell* factors as noted above. The *Green* court held that the state must file a treatment plan specific to the defendant. The plan must consider the defendant's particular situation and health and must specify the medication and dosages to be administered to attempt to restore competency. The circuit court, not the DHS, must approve the plan.

On March 16, 2021, District 1 of the Wisconsin Court of Appeals decided *State v. Anderson*, No. 2020AP819-CR, 2021 WL 968688 (Wis. Ct. App. Mar. 16, 2021) (unpublished opinion not citable per Wis. Stat. § 809.23(3)) (petition for review filed). The *Anderson* decision contradicted the recently decided *Green* case out of District 4. The court in *Anderson* held that the state's filed plan of treatment for the defendant can be from a psychologist instead of from a medical professional who can prescribe medication. *Anderson* further contradicted *Green* in approving the circuit court's acceptance of a treatment plan that was not specific about the medication and dosages appropriate for the defendant.

Attorneys should thoroughly read *Sell*, *Fitzgerald*, *Green*, and *Anderson* and watch for the inevitable litigation that will follow, given recent contradictory court of appeals opinions.

Note. In *State v. Scott*, 2019 WI 74, 382 Wis.2d 476, 914 N.W.2d 141, the supreme court held that defendants ordered to receive involuntary medication have the right to appeal the decision and have an automatic stay of the order while the appeal makes its way through court. The state can move the circuit court to lift the stay.

F. Competency Hearing—Wis. Stat. § 971.14(4) [§ 6.10]

Copies of the examiner's report are distributed to the district attorney and defense counsel. If the defendant is self-represented, the defendant is provided directly with a copy of the report. The sheriff or jailer at the facility where a defendant is held can request a copy of

the report as well, and the sheriff or jailer can provide a copy of the report to the medical-care staff and medical-records staff at the jail. *See* Wis. Stat. § 971.14(4)(a).

At a competency hearing, the parties can present additional evidence on the issue of competency beyond the court-ordered report. Testimony can be received via telephone or video means upon a showing of good cause by the party offering the evidence. The parties can also waive their right to present further evidence on the issue, and then the issue of competency is determined upon the report, as is the issue of whether the defendant is competent to refuse medication and treatment. *See* Wis. Stat. § 971.14(4)(b).

When the hearing begins, the judge must ask the defendant whether the defendant claims to be competent or incompetent. If the defendant claims incompetency (or does not answer), the defendant must be found incompetent unless the district attorney proves competency by the greater weight of the credible evidence. If the defendant claims to be competent, the defendant should be found competent unless the district attorney proves otherwise by evidence to a clear and convincing standard. *See* Wis. Stat. § 971.14(4)(b).

If the defendant is found incompetent but likely to regain competency, to obtain an order for involuntary medication, the district attorney must also prove all four *Sell* factors as noted in section 6.9, *supra*, to a clear and convincing standard. *See State v. Fitzgerald*, 2019 WI 69, 387 Wis. 2d 384, 929 N.W.2d 165.

G. Commitment—Disposition After Competency Findings—Wis. Stat. § 971.14(5) [§ 6.11]

If the court finds upon the report or after taking evidence that the defendant is competent, then the criminal proceedings can resume.

If the court finds that the defendant is not competent but is likely to regain competency within the statutory time period, the proceedings are suspended and the defendant is committed to the DHS for "treatment for a period not to exceed 12 months, or the maximum sentence specified for the most serious offense within which the defendant is charged, whichever is less." *See* Wis. Stat. § 971.14(5). The DHS determines where competency restoration occurs. Competency restoration can occur in inpatient facilities, outpatient with community treatment programs, or at jails that have agreements with the state to provide such treatment. The county sheriff is tasked with transporting the defendant to the location of treatment if it is not occurring outpatient. Commitment under this section counts as custody credit toward any later criminal sentence. The DHS can convert outpatient competency-restoration treatment to inpatient competency-restoration treatment if the defendant violates a condition of the commitment or is deemed to be a safety concern. *See* Wis. Stat. § 971.14(5)(a).

If involuntary medication or treatment has not been initially ordered with the commitment, the court can rehear that issue during the competency-restoration period upon motion by the DHS. A hearing on the issue of involuntary medication treatment must be heard within 10 days, unless the parties request a postponement, which can be granted for up to 20 days after the date of the motion. *See* Wis. Stat. § 971.14(5)(am). Per the holding in *Fitzgerald*, the court can order involuntary medication only in compliance with *Sell* factors.

During the competency-restoration period, the defendant is periodically reexamined, and written reports of examination are provided to the court at three-month intervals. Reexamination reports should address whether the defendant is competent or incompetent, and if incompetent, should also address whether competency can be achieved within the remaining statutory timeframe. *See* Wis. Stat. § 971.14(5)(b).

If a report indicates that a defendant has regained competency or that restoration of competency is not likely to occur within the statutory timeframe, the court must conduct a hearing within 14 days after receiving the report and proceed under Wis. Stat. § 971.14(4). If the court finds that the defendant is competent, the criminal proceedings resume. The court can order that competency-restoration efforts continue if the court finds that the defendant is making "sufficient progress toward becoming competent." *See* Wis. Stat. § 971.14(5)(c).

If the defendant becomes incompetent after regaining competency, "the maximum commitment period under par. (a) shall be 18 months minus the days spent in previous commitments under this subsection, or 12 months, whichever is less." *See* Wis. Stat. § 971.14(5)(d).

H. Discharge to Civil Proceedings—Wis. Stat. § 971.14(6) [§ 6.12]

If the court finds that the defendant is not competent and is not likely to regain competency within the statutory time period, then the criminal proceedings are suspended and the defendant is released, or the defendant can be ordered to appear in court periodically within the statutory timeframe for redetermination of competency to proceed. *See* Wis. Stat. § 971.14(6)(a).

The court can also order that the criminal proceedings are suspended but that the defendant be taken into custody and brought to a facility specified in Wis. Stat. ch. 51. From this point, the custody of the defendant is governed by the Wis. Stat. ch. 51 civil commitment process, in which a person can be committed if the person is deemed to be (1) mentally ill, (2) able to be treated for the mental illness, and (3) a danger to themselves or others as enumerated in Wis. Stat. ch. 51. *See* Wis. Stat. § 971.14(6)(b). The Wis. Stat. ch. 51 commitment process is discussed at length in chapter 2, *supra*.

V.
Not Guilty by Reason of Mental Disease or Defect [§ 6.13]

A. Not Guilty by Reason of Mental Disease or Defect Defense Generally [§ 6.14]

The presence of mental illness at the time of the commission of a crime can be a defense against being held criminally responsible for that crime. This defense is codified in Wis. Stat. § 971.15 – Mental responsibility of defendant. This defense typically is referred to in short as an NGI defense.

NGI is an affirmative defense that negates criminal responsibility for conduct. It is a defense that acknowledges the occurrence of criminal behavior but allows a person to avoid criminal responsibility for that behavior because mental illness prevented the person from knowing right from wrong or prevented the person from conforming their conduct in accordance with the law. *See* Wis. Stat. § 971.15(1). If an NGI defense is offered successfully, it does not mean that a defendant will face no consequences for their conduct. Instead, there are civil commitment and restricted-liberty consequences, which can be as severe as life in a mental hospital or institution, result in an inability to own firearms or work in certain professions, and result in prohibitions from leaving the state. The attorney must make the client aware of the possible severe life and liberty consequences of a successful NGI plea before the client asserts this defense. Defense counsel must discuss the range of possible outcomes and consequences with defendants when considering the NGI plea.

The NGI defense is asserted to explain and give context to a defendant's actions and behaviors at the time a crime was committed. An NGI defense can be asserted by a defendant who continues to have active symptoms of mental illness, or it can be asserted by a defendant who has since stabilized. The NGI defense considers a defendant's conduct *at the time of the offense* and is not necessarily a reflection of how the defendant presents during the later criminal proceedings.

Note. The NGI defense cannot be used to negate responsibility for probation violations within the probation revocation process. If a probation violation also results in a newly charged criminal offense, the NGI defense can be pursued in the separate criminal proceeding but not as a defense against the probation violation in the probation revocation process.

B. NGI Pleas—Wis. Stat. § 971.15 [§ 6.15]

NGI is an *affirmative defense*, meaning, a defendant in a criminal case must assert or raise the defense in the case. The burden is on the defendant to prove NGI "to a reasonable certainty by the greater weight of the credible evidence." *See* Wis. Stat. § 971.15(3). The Wisconsin Supreme Court has held that requiring a defendant to meet this burden of proof is not a denial of due process. *See State v. Dix*, 86 Wis. 2d 474, 273 N.W.2d 250 (1979).

There are two situations in which an NGI defense can be asserted. If at the time of the commission of the offense the defendant "lacked substantial capacity to appreciate the wrongfulness of his or her conduct," the defendant cannot be held criminally responsible. Additionally, if at the time of the commission of the offense the person "lacked substantial capacity to … conform his or her conduct to the requirements of law," the defendant cannot be held criminally responsible. *See* Wis. Stat. § 971.15(1).

The bifurcated trial process of the NGI plea, with a guilt phase and responsibility phase, is considered later in this chapter, but here it is worth noting that asserting an NGI defense is different than asserting that a "mental disease or defect" negates an element of the crime. An NGI defense is considered in the second phase of the bifurcated trial process. It is not considered in the first phase to negate any elements of the charged crime. Experts are not permitted to testify in the first part of a bifurcated trial as to the defendant's ability to form the intent to commit the crime. *See Steele v. State*, 97 Wis. 2d 72, 294 N.W.2d 2 (1980). Such testimony in the guilt phase of the trial has been deemed "irrelevant and incompetent when offered to establish a defendant's lack of specific criminal intent," and excluding it from the jury's consideration as evidence in the first guilt phase is not arbitrary or unreasonable and does not violate a defendant's due process rights. *See Haas v. Abramson*, 910 F.2d 384, 389 (7th Cir. 1990).

There is no stringent timeframe in which an NGI defense must be asserted, but case law provides general parameters. The NGI plea must be made or raised "sufficiently in advance of trial" to put the state on notice and allow the necessary time to conduct required pretrial

procedures. *See State v. Kazee*, 192 Wis. 2d 213, 222, 531 N.W.2d 332 (Ct. App. 1995). It is preferable to enter a plea of NGI earlier rather than later, as a court has discretion to reject NGI pleas made in later stages of proceedings. This exercise of discretion balances the "interests of the defendant with the institutional need to resolve cases in a timely fashion." *See State v. Oswald*, 2000 WI App 3, 232 Wis. 2d 103, 606 N.W.2d 238. If a defendant makes a late-in-proceedings request to change the plea from not guilty to NGI, the defendant "has the burden of showing why the plea change is appropriate. … [T]he defendant must make an offer of proof encompassing the elements of the defense." *See id*. ¶ 49; *Kazee*, 192 Wis. 2d 213.

Wis. Stat. § 971.06(1)(d) permits simultaneous or joined pleas of "not guilty" and "not guilty by reason of mental disease or defect." Combining an NGI plea with a guilty plea means that a defendant admits the elements of the offense charged. *See State v. Lagrone*, 2016 WI 26, ¶ 30, 368 Wis. 2d 1, 878 N.W.2d 636. Upon such combination of pleas, the defendant will be found guilty, and the proceedings move to a determination of whether the defendant should be found NGI. More discussion of this bifurcated procedure follows in section 6.17, *infra*.

C. NGI Pretrial Procedures and Requirements of Examination—Wis. Stat. § 971.16(2)–(4) [§ 6.16]

The purpose of pretrial procedures specific to the NGI plea is to appoint doctors to examine the defendant. The appointed doctors can be either physicians or psychologists who, upon examination, produce reports of their findings. *Physician* is defined in Wis. Stat. § 448.01(5), and a *psychologist* is "a person holding a valid license under [Wis. Stat. §] 455.04." *See* Wis. Stat. § 971.16(1)(a), (b).

The court can appoint up to a total of three physicians or psychologists to examine the defendant and testify at trial. The court sets the rates of compensation for the appointed examiner and the county of the action pays for the examination. A stern warning regarding extra compensation beyond the county's fixed rate is given in the statutes: "The receipt by any physician or psychologist summoned under this section of any other compensation than that so fixed by the court and paid by the county, or the offer or promise by any person to pay such other compensation, is unlawful and punishable as contempt of court." Wis. Stat. § 971.16(2). Defense counsel and the district attorney can also hire their own experts at their own expense.

Attorneys for defendants in Wis. Stat. ch. 971 proceedings will benefit from having a client's treatment records, and Wisconsin law allows counsel to access these records without the need for written releases. Wis. Stat § 51.30(4)(b)11. authorizes defense counsel to have access to treatment and registration records for defendant-clients in Wis. Stat. ch. 971 NGI proceedings "at any time," without written consent from defendants. Attorneys may encounter facilities and treatment providers that insist on written releases, but this statute provides that records are to be released to counsel "without informed written consent," *See* Wis. Stat. § 51.30(4)(b).

Fifth Amendment protections against self-incrimination are still present for defendants when entering an NGI plea. A defendant's Fifth Amendment rights against self-incrimination are safeguarded, in that "any inculpatory statements made by [the defendant] in the psychiatric examinations are inadmissible in the guilt phase of [the defendant's] trial." *See State v. Jacobsen*, 164 Wis. 2d 685, 687, 476 N.W.2d 22 (Ct, App. 1991).

Examiner reports are due 10 days before trial for court-appointed examiners or "at any other time as the court directs." *See* Wis. Stat. § 971.16(3). The judge distributes copies of the court-appointed examiners report to the district attorney and to defense counsel. *See id*.

For examiners retained by the defendant or district attorney, reports are due 15 days before trial and must be provided to opposing counsel. Failure by the defense to provide their examiner's report within the statutory timeframe has harsh consequences. If the defendant's retained examiner does not submit the examiner's report to the district attorney at least 15 days before trial, the statute directs that the examiner's testimony will not be received in the matter. Wis. Stat. § 971.16(4). Testimony from the defendant's examiner can also be excluded from the matter if the defendant does not make themself available to the prosecution for examination upon the state's "seasonably demanded" request to observe and examine the defendant. Wis. Stat. § 971.16(4).

The contents of the examiner's report remain confidential until the examiner testifies or until the completion of the trial. The report must offer an opinion directly on the application of the NGI defense to the defendant and the facts of the case. Specifically, the report must state the examiner's opinion as to whether, at the time of the commission of the offense, the defendant had the ability to (1) appreciate the wrongfulness of the conduct or (2) conform the conduct within the requirements of the law. Wis. Stat. § 971.16(3)(a), (b). If the examination yields enough information to do so, the contents of the report should opine whether the defendant needs medication or treatment for the condition and whether the defendant is competent to refuse medication. *See* Wis. Stat. § 971.16(3)(a), (b).

Examiners may offer testimony about the nature of the exam, such as the conditions, environment, and general scene and place and conduct of the examination. The examiner may testify about their "diagnosis of the mental condition of the defendant at the time of the commission of the offense charged." Wis. Stat. § 971.16(5). The examiner testifies to the ultimate applicability of the asserted NGI defense:

"the ability of the defendant to appreciate the wrongfulness of their conduct and/or to conform to the requirements of law." *Id.* Finally, the examiner testifies to the defendant's need for medication and treatment and the defendant's competence to refuse medication and treatment, subject to whether the examiner has "sufficient information" to render those opinions. *Id.* The examiner must be made available to the opposing party for cross-examination. *See id.*

D. NGI Bifurcated Trial Procedure—Wis. Stat. § 971.165 [§ 6.17]

A defendant who asserts an NGI defense need not concede overall general guilt in the matter. The defendant can simultaneously assert an NGI defense while also maintaining that the state cannot prove the defendant's guilt beyond a reasonable doubt generally, based on the facts as applied to the elements of the crime. The bifurcated NGI trial procedure reflects the two avenues in which a defendant can avoid criminal responsibility for the crimes charged. As with any other criminal matter, the state must first prove beyond a reasonable doubt the defendant committed the crime charged. If overall guilt is contested, the first phase of the NGI bifurcated trial process looks just like a regular criminal trial.

When the defendant simultaneously enters pleas of "not guilty" and "not guilty by reason of mental disease and defect," Wis. Stat. § 971.165(1)(a) requires a "separation of the issues" and a "sequential order of proof in a continuous trial." This is referred to as bifurcation. The bifurcated procedure to determine each plea separately and sequentially aims to ensure that evidence presented about the mental condition of the defendant does not prejudice determinations about a defendant's general guilt in the matter. *State ex rel. LaFollette v. Raskin*, 34 Wis. 2d 607, 623, 150 N.W.2d 318 (1967). First, the general plea of "not guilty" is determined, then the trial enters the second part of the process, during which the plea of "not guilty by reason of mental disease or defect" is determined. *See* Wis. Stat. § 971.165(1)(a).

The first part of the bifurcated trial process is referred to as the guilt phase, and the second part of the bifurcated trial process is referred to as the responsibility phase.

If the trial is to a jury rather than to the court, the jury is to be informed of each separate plea the defendant has made at the outset of the trial. The jury will be informed that the defendant has made two separate pleas: a plea of "not guilty" and a plea of "not guilty by reason of mental disease or defect." The jury will be further informed that "a verdict will be taken upon the plea of not guilty before the introduction of evidence on the plea of not guilty by reason of mental disease or defect." There must be a unanimous verdict on the first plea. *See* Wis. Stat. § 971.165(1)(b).

The same jury is to hear evidence on both pleas. If the jury panel remains intact through the guilt phase of the trial, and later one or more jurors becomes "unable to serve," the jurors who remain hear evidence in the responsibility phase of the trial and make a determination on the NGI plea. Wis. Stat. § 971.165(1)(c). If the jury cannot reach a verdict on the NGI plea and the jury is "discharged" before reaching a verdict in the second part, the defendant does not get another trial on the guilt phase. Instead, "a different jury may be selected to determine the [second] plea only." *Id*. If the jury does reach a verdict on the NGI plea, and that NGI verdict is reversed or vacated while leaving intact the guilt phase verdict, a different jury may be selected to once again consider the NGI plea. *See id*.

If during the first part of the bifurcated trial process the defendant is found not guilty, the defendant is acquitted. If the defendant is found guilty in the first part of the bifurcated trial process, "the court shall withhold entry of judgment pending determination of the second plea." *See* Wis. Stat. § 971.165(1)(d).

Unlike a regular criminal trial in which NGI is not an issue, the jury in an NGI trial does hear about potential consequences the defendant will face if the jury reaches a verdict of not guilty by reason of mental disease or defect. The jury will hear that instead of criminal consequences, the defendant will be "committed to the custody of the department of health services and will be placed in an appropriate institution unless the court determines that the defendant would not pose a danger to himself or herself or to others if released under conditions ordered by the court." *See* Wis. Stat. § 971.165(2).

Unlike the guilt phase of the trial, for which a unanimous jury is required, a verdict on the NGI plea requires only five-sixths of the jurors. For a 12-person jury, this means that 10 jurors would need to reach a verdict of NGI and 2 could disagree. *See* Wis. Stat. § 971.165(2). Only a five-sixths verdict is required because the responsibility phase of the bifurcated NGI trial is not a criminal proceeding. Instead, the responsibility phase of the bifurcated trial has "civil hues" and "elements of civil procedure" and is an assertion of statutory and not constitutional rights, thereby taking the responsibility phase out of the realm of criminal procedure. *See State v. Magett*, 2014 WI 67, ¶ 40, 355 Wis. 2d 617, 850 N.W.2d 42.

If the jury does not reach a verdict of NGI, the court enters a judgment of conviction upon the defendant and shall sentence pursuant to criminal consequences. If the jury reaches a verdict of NGI, the court shall enter a judgment reflecting that verdict, and proceed to the

criminal commitment phase pursuant to Wis. Stat. § 971.17. *See* Wis. Stat. § 971.165(3)(a), (b).

Notably, expert testimony is "not dispositive" to a verdict of an NGI, because "the trier of fact retains the sole responsibility" to decide whether the burden of proof for an NGI verdict is met. *See State v Kucharski*, 2015 WI 64, ¶ 30, 363 Wis. 2d 658, 866 N.W.2d 697.

E. Criminal Commitments—Wis. Stat. § 971.17—Commitments of Individuals Found NGI for Offenses Committed On or After January 1, 1991 [§ 6.18]

If a defendant successfully asserts and proves the NGI defense and a court or jury finds the defendant NGI, the court enters a judgment of that finding and proceeds to the criminal commitment process as codified in Wis. Stat. § 971.17.

F. Commitment Period—Wis. Stat. § 971.17(1), (1m) [§ 6.19]

The maximum potential length of a criminal commitment depends on whether the crime was a felony or a misdemeanor and the date of the commission of the crime. Felonies committed before July 30, 2002, have a maximum potential commitment period equal to two-thirds of the maximum term of imprisonment that could be imposed for the felony charged. Wis. Stat. § 971.17(1)(a). Felonies committed after July 30, 2002, have a maximum potential commitment period equal to the maximum term of imprisonment that could be imposed for the felony charged. Wis. Stat. § 971.17(1)(b). Felonies carrying a penalty of life imprisonment can result in lifetime criminal commitments. Wis. Stat. § 971.17(1)(c)

Misdemeanors have a maximum potential commitment period equal to two-thirds of the maximum term of imprisonment that could be imposed for the misdemeanor charged. Imprisonment authorized by penalty enhancers counts in these calculations. Defendants are entitled to credit against these commitments for days spent in custody per Wis. Stat. § 973.155.

Defendants found NGI on "serious sex offenses" as defined in Wis. Stat. § 939.615(1)(b) can be placed on lifetime supervision in addition to the criminal commitment if the court finds that lifetime supervision is "necessary to protect the public." Defendants found NGI on certain sexual assault offenses will be required to give DNA samples and can be required to register as a sex offender if the "conduct was sexually motivated" and "it would be in the interest of public protection." See Wis. Stat. § 971.17(1m) for further commitment requirements on sexual assault offenses. Additionally, commitments under Wis. Stat. ch. 980 for various sex offenses are discussed at length in chapter 3, *supra*.

G. Investigation and Examination—Wis. Stat. § 971.17(2) [§ 6.20]

The court is to enter the initial commitment order "as soon as practicable" after the NGI judgment is entered. Wis. Stat. § 971.17(2)(a). Entry of an initial commitment order can be delayed, and the court can order a "predisposition investigation" per Wis. Stat. § 972.15 and a mental examination. If a mental examination is ordered, the court appoints one or more examiners and can commit the person to a mental health facility for the examination. Examiners have 15 days to complete the exam and file their report and can get one 15-day extension for good cause. Examiners are to personally examine the defendant and review the person's treatment records. The county pays for these exams. The court must hold a hearing on the commitment within 10 days after the examiner's report is filed.

If the examiner concludes that conditional release is appropriate, their report should address the community treatment and services the individual needs.

H. Commitment Order—Wis. Stat. § 971.17(3) [§ 6.21]

Commitment orders should specify where the commitment shall be. Commitments will be made to either institutional care or conditional release.

If a court finds to a clear and convincing standard that conditional release of the individual "would pose a significant risk of bodily harm" to self or others, or of "serious property damage," the court must order institutional care. *See* Wis. Stat. § 971.17(3)(a). The court can consider any evidence on this point, and the statute provides that the court may consider (1) the facts of the crime upon which the individual was found NGI, (2) the individual's mental history and present mental condition, (3) where the person will live, (4) the source(s) of the person's support, (5) safeguards and arrangements to ensure access to and taking of necessary medication, and (6) availability of other treatment. *See id.*

An involuntary medication order can be issued if the prosecution proves that the individual is not competent to refuse medication or treatment, as contemplated by Wis. Stat. § 971.16(3). The prosecution has the burden of proof to the clear and convincing standard.

Note. If institutional care is ordered, the DHS will determine the appropriate institutional placement for the individual considering the individual's needs and public safety concerns. The institution where the individual is committed to institutional care can move the court for an involuntary medication order if the individual is not subject to such an order. The involuntary medication motion must be based on a report from a licensed physician. Evidentiary hearings on the motion must be held within 10 days after the involuntary medication motion is filed but can be postponed, at the request of the parties, until no later than 20 days after the motion. The prosecution has the burden of proof to a clear and convincing standard. The parties may waive an opportunity to present evidence on the issue of involuntary medication, allowing the court to make findings on the motion's accompanying report.

If conditional release is ordered, the court will notify the DHS. The DHS must prepare a conditional release plan that identifies any community-based treatment and services the individual will receive. Per Wis. Stat. § 971.17(3)(d), the conditional release plan must address any need for (1) supervision, (2) medication, (3) community support services, (4) residential services, (5) vocational services, and (6) substance-use-disorder treatment. The plan requires court approval and must be presented to the court within 21 days after the conditional release finding unless the parties request more time to develop the plan. Individuals on conditional release are under the custody and control of the DHS and are subject to conditions and rules as set by the DHS and the court.

If the DHS alleges that a conditionally released person has violated the conditions established by the court or rules of the DHS or that their safety requires revocation of release, the individual can be taken into custody. Wis. Stat. § 971.17(3)(e). Within 72 hours after the time the person is detained (excluding weekends and holidays), the DHS must submit a probable cause statement and petition to revoke conditional release to the court of commitment and the State Public Defender's local office. The revocation-of-conditional-release petition must be heard within 30 days unless the in-custody individual waives the timeline. The prosecution must prove the allegations of the petition to a clear and convincing standard. An order for conditional release can be revoked upon a finding of a violation of conditions or rules or a finding that the safety of the individual or other persons requires revocation. *See* Wis. Stat. § 971.17(3)(e).

I. Petitions for Conditional Release—Wis. Stat. § 971.17(4) [§ 6.22]

A person committed to institutional care can petition for conditional release if six months have elapsed since the latest final orders in the matter. Directors of facilities where the individual is placed can petition for conditional release on behalf of the individual at any time. Petitions for conditional release that are filed without counsel must be served on the district attorney and referred to the public defender. The court must appoint one or more examiners to assess the individual for conditional release and do so within 20 days after receiving the petition.

Examiner reports are due 30 days after appointment. The examiner must have "reasonable access" to the individual and access to their treatment records. Counsel for the defendant is entitled to treatment records without a release per Wis. Stat. § 51.30(4)(b)11. If the examiner concludes that conditional release is appropriate, the examiner must identify community-based treatment and services needed by the individual, if any. The court must hear the petition within 30 days after receiving the examiner's report. The court must grant the conditional-release petition unless it finds, to a clear and convincing standard, that the individual poses a significant risk of committing bodily harm to himself or herself or other persons or there is a serious property damage risk. The court can consider any evidence on this point, and the statute provides that the court *may* consider the following: (1) the facts of the crime upon which the individual was found NGI, (2) the individual's mental history and present mental condition, (3) where the person will live, (4) the source(s) of the person's support, (5) safeguards and arrangements to ensure access to and taking of necessary medication, and (6) availability of other treatment. Wis. Stat. § 971.17(4)(d).

If conditional release is ordered, the court will notify the DHS. The DHS must prepare a conditional-release plan that identifies any community-based treatment and services the individual will receive. The conditional-release plan must address any need for (1) supervision, (2) medication, (3) community support services, (4) residential services, (5) vocational services, and (6) substance-use-disorder treatment. Wis. Stat. § 971.17(4)(e)1. The plan must specify who is responsible for providing the identified treatment and services and must be presented to the court for approval within 60 days after the finding of appropriateness for conditional release.

J. Petition for Termination of Criminal Commitment—Wis. Stat. § 971.17(5) [§ 6.23]

An individual on conditional release can petition the court for termination of the commitment order. The DHS can also petition on the individual's behalf. Petitions filed without counsel will be served on the district attorney and referred to the public defender. The court must hear the petition "as promptly as practicable," and a jury is not required.

Commitment orders must be terminated unless the court finds, to a clear and convincing standard, that further supervision is necessary. Further supervision is deemed necessary if the court finds significant risk of bodily harm to self or others or there is a serious property damage risk. The court can consider any evidence on this point, including (1) the facts of the crime upon which the individual was found NGI; (2) the individual's mental history and present mental condition; (3) the individual's behavior while on conditional release; (4) where the person will live; and (5) the availability of support, treatment, and services upon termination of the commitment. Petitions for termination can be filed if six months have elapsed since the latest final orders in the matter.

K. Expiration of Criminal Commitment Orders—Wis. Stat. § 971.17(6) [§ 6.24]

The DHS must notify the committing court, the district attorney, and the appropriate county department under Wis. Stat. § 51.42 or 51.437 at least 60 days before the commitment's expiration. The court will discharge the person unless the county department under Wis. Stat. § 51.42 or 51.437 proceeds with Wis. Stat. ch. 51 civil commitment proceedings against the individual.

L. Hearings and Rights During Criminal Commitment Proceedings—Wis. Stat. § 971.17(7) [§ 6.25]

Individuals against whom criminal commitment is sought have the right to reasonable notice of hearings. They also have, at hearings on commitment, the right to (1) be represented by counsel, (2) remain silent, (3) present and cross-examine witnesses, and (4) have the hearing recorded by a court reporter. If the individual wants to be examined by an expert, the procedure for appointment of examiners under Wis. Stat. § 971.16(4) applies. Indigent individuals have the right to court-appointed examiners at public expense.

Note. The commitment of individuals found NGI for offenses committed before January 1, 1991, are governed by Wis. Stat. § 971.17 (1987–88), as affected by 1989 Wis. Act 31.

Note. There is no uniform insanity defense in the United States, and the scope of insanity defenses varies depending on the individual state. The state of Kansas has a very narrow NGI defense, which disallows "appreciating the wrongfulness of conduct." In *Kahler v. Kansas*, 140 S. Ct. 1021, 1037 (2020), the U.S. Supreme Court held that "due process does not require Kansas to adopt an insanity test that turns on a defendant's ability to recognize that his crime was morally wrong." This Supreme Court ruling means that the Wisconsin NGI defense currently offers defendants more than required by due process. It is not unreasonable to contemplate that this ruling may put insanity defenses wholly in jeopardy, with considerations of a defendant's mental condition becoming mitigation factors at sentencing rather than defenses.

VI. Voluntariness of Statements [§ 6.26]

A. General Concepts [§ 6.27]

Due process and the constitutional right against self-incrimination require that statements be the result of a free exercise of a defendant's will and deliberativeness of choice. *See Brown v. Mississippi*, 297 U.S. 278 (1936). Defendants have a right to a "fair hearing" to determine whether statements should be suppressed. *See State v. Jiles*, 2003 WI 66, ¶ 27, 262 Wis. 2d 457, 663 N.W.2d 798.

A court deciding a motion to suppress a statement for being involuntary will consider the personal characteristics of the defendant, including any mental health conditions, balanced against any law enforcement coercion of the defendant that secured the statement. This balancing act is expressed as a "totality of circumstances" test to assess if statements by defendant were made voluntarily. *See State v. Clappes*, 136 Wis. 2d 222, 401 N.W. 2d 759 (1987). A defendant's mental health condition or mental state during questioning can be a relevant personal characteristic for consideration by the court in applying the balancing test.

Practice Tip. There are no bright lines in this balancing test. Determinations of voluntariness of statements are made on a case-by-case basis. Nothing in the test requires a finding of involuntariness if a particular mental illness or condition is present, but such mental states are factors for consideration. No one type of mental illness or mental condition will be dispositive of the case. Nothing in the test requires a finding of involuntariness because a particular law enforcement tactic is exerted on the defendant, but such tactics are factors for consideration. Law enforcement tactics may be coercive as to certain defendants but not coercive as to others. There must also be a threshold finding that law enforcement tactics induced the statement for the statement to be suppressed. The test for voluntariness requires a nexus between coercive law enforcement tactics and the procurement of the defendant's statement.

Under the totality of circumstances test for voluntariness, the mental condition of the defendant will have varying degrees of relevancy and importance depending on the law enforcement tactics exerted in the questioning. The importance or relevance of the mental condition

of the defendant is not given the same level of weight or consideration in each case. Because the voluntariness test balances the personal characteristics of the defendant against coercive law enforcement tactics, there is a symbiotic relationship in the assessment.

Example. If the law enforcement interrogation tactic was relatively mild, devoid of accusatory tone, yelling, and not overly lengthy, but it included some misrepresentations of evidence and an expression of belief that the officer thought the defendant was not being truthful, that tactic may be coercive to a defendant with Down syndrome as opposed to a defendant with depression. Law enforcement tactics are assessed for coerciveness considering the defendant's personal characteristics, which necessarily include their mental condition or illness.

If issues regarding the admission of the statement based on voluntariness are raised during a jury trial, the evidence on voluntariness must be heard outside the presence of the jury. *See* Wis. Stat. § 971.31(3).

Note. Statements can be suppressed because they are (1) involuntary or (2) were made in violation of *Miranda* rights. This chapter only addresses suppression of statements based on involuntariness. Objecting to a statement as involuntary is not the same as objecting to a statement for lack of *Miranda* warnings. Each is a separate challenge that does not include the other. *See Jiles*, 2003 WI 66, ¶ 25, 262 Wis. 2d 457.

B. Timing of Motions and Test for Voluntariness [§ 6.28]

Wis. Stat. § 971.31(3) states that "[t]he admissibility of any statement of the defendant shall be determined at the trial by the court in an evidentiary hearing out of the presence of the jury, unless the defendant, by motion, challenges the admissibility of such statement before trial." While not required, it is preferable to challenge the admission of statements before trial rather than during the trial. Knowing which evidence is admissible before trial results in more efficient preparation and tailoring of trial strategy.

As discussed above, the voluntariness of a statement is assessed through a "totality-of-circumstances" test. This test directs the court to balance the personal characteristics of the defendant against the law enforcement pressure exerted on the defendant in procuring the statement. *See State v. Clappes*, 136 Wis. 2d 222, 236, 401 N.W. 2d 759 (1987). When applying the totality-of-circumstances test, the court is not to consider the veracity of the statement sought to be excluded. *See State v. Agnello*, 226 Wis.2d 164, 177, 593 N.W.2d 427 (1999). It is the state's burden to show, to a preponderance of the evidence, that a statement was voluntarily made. *See id*. at 182. A sense of "fairness and justice" should inform the court's application of the balancing test for assessing voluntariness of statements. *See Phillips v State*, 29 Wis. 2d 521, 530, 139 N.W.2d 41 (1966).

The wrong sought to be righted by suppression of statements in these matters is the wrong of coercive law enforcement tactics that result in overcoming a defendant's free will in deciding to make a statement. Involuntariness of a confession requires finding a nexus between the defendant's statement and coercive law enforcement tactics that procured the statement. A statement will not be considered involuntary if it was made in the absence of law enforcement pressure or coercion. Statements that result from the coercion from family, friends, or other private parties are not suppressible as involuntary statements. *See Colorado v. Connelly*, 479 U.S. 157, 166 (1986). Similarly, self-imposed coercion within the defendant will not require suppression of statements. *See Blaszke v State*, 69 Wis. 2d 81, 90–91, 230 N.W.2d 133 (1975).

If a statement is determined to be involuntarily made, it cannot be used for any purpose at trial, including during impeachment. *See Upchurch v. State*, 64 Wis. 2d 553, 562, 219 N.W.2d 363 (1974). Any evidence obtained because of an involuntarily made confession also gets suppressed. *State v. Harris*, 199 Wis. 2d 227, 248–49, 544 N.W.2d 545 (1996).

Practice Tip. A defendant can testify at the suppression hearing. This could be an important way to demonstrate the defendant's personal characteristics and manifestations of mental condition. During testimony, the degree to which the defendant might be susceptible to coercive tactics may be obvious. A defendant's testimony can set the scene of the interrogation, and the court can hear from the defendant about the defendant's personal characteristics and the resulting experience of the interrogation. When considering calling a defendant as a witness, proceed with caution. Note that if a defendant testifies at a hearing on the voluntariness of the confession, that hearing testimony can be used to impeach at trial. *See State v. Schultz*, 152 Wis. 2d 408, 426–27, 448 N.W.2d 424 (1989).

C. Personal Characteristics of the Defendant [§ 6.29]

The mental illness or condition of a defendant is a personal characteristic of a defendant that directly bears on the defendant's experience of the interrogation and the ability they have to exercise their free and unconstrained will when confronted with law

enforcement coercion tactics. It is a recognition that some people with mental conditions will be more susceptible or vulnerable in the face of law enforcement interrogation techniques. It is also a recognition that the U.S. and Wisconsin Constitutions permit law enforcement officers to engage in "subtle forms of psychological persuasion" during interrogations. *See Colorado v. Connelly*, 479 U.S. 157, 164 (1986).

A defendant's "psychological response" to the conditions of the questioning should be determined by the court in assessing statements for voluntariness. *See State v. Hoyt*, 21 Wis. 2d 284, 305, 128 N.W.2d 645 (1964). Recreating the conditions of interrogation and the experience of the defendant during questioning could be a useful defense strategy in seeking a finding of involuntariness.

In *State v. Reynolds*, 2010 WI App 56, ¶ 45, 324 Wis. 2d 385, 781 N.W.2d 739, the Wisconsin Court of Appeals identified relevant personal characteristics of the defendant to be considered in assessing involuntariness, including the defendant's age, education and intelligence, physical and emotional condition, and prior experience with law enforcement. Statements will not be found to be involuntary based solely on the defendant's personal characteristics. *See State v. Moore*, 2015 WI 54, ¶ 56, 363 Wis. 2d 376, 864 N.W.2d 827.

The younger the defendant, "the more carefully [the court] will scrutinize police questioning tactics." *Id.* ¶ 57. In *Moore*, the statement of a 15-year-old defendant was found to be voluntary, despite his below-average intelligence, 11 hours of police custody, and 5.5 hours of questioning. The *Moore* court favored voluntariness, finding that Moore had past experience with police officers, the "ability to develop story about his non-involvement," and the ability to "adapt details of story" to police information. *Id.* ¶ 60. The *Moore* court further found that police tactics did not render the statement involuntary.

In State v. Wallace, 59 Wis. 2d 66, 82, 207 N.W.2d 855 (1973), the Wisconsin Supreme Court found the statement to be voluntary, despite the adult defendant's fourth-grade education, because he was otherwise found to be "intelligent and quick witted." Wallace had also argued his statement was involuntary because he slept poorly as a result of "abominable jail conditions." *Id.* at 83. The court rejected this while conceding that sleep deprivation can be a factor going to involuntariness if the deprivation of sleep is connected to interrogation tactics such as "night-time questioning." *Id.* at 84; *see also State v. Hoyt*, 21 Wis.2d 284, 128 N.W.2d 645 (1964).

Practice Tip. When representing defendants with mental illness, consider how that illness bears or interferes with their intelligence and how the mental illness might be exacerbated by the conditions of questioning by law enforcement officers.

There is no prohibition on law enforcement officers' questioning of defendants who are injured, intoxicated, and receiving treatment for their injuries. Pain and intoxication can be factors in favor of a finding of involuntariness if they cause irrationality, confusion, or other involuntary responses. *See State v. Clappes*, 136 Wis. 2d 222, 401 N.W.2d 759 (1987).

Practice Tip. From this it can be extrapolated or argued that mental illnesses or mental states that result in confused, irrational, and other types of involuntary responses to police questioning are personal characteristics that are relevant to the voluntariness analysis. Consider how a defendant's mental illness affects their physical and emotional state within the context of the police tactics they experienced during questioning.

A case that very closely approaches consideration of mental illness as a personal characteristic of the defendant is *State v. Hoppe*, 2003 WI 43, 261 Wis.2d 294, 661 N.W.2d 407. Hoppe was experiencing severe alcohol withdrawal during the days he was questioned by police officers in the hospital. This withdrawal caused Hoppe to have mental and physical problems. He was confused about the date and his whereabouts. He had difficulty following instructions and was diagnosed with "delirium tremors" and "chronic brain syndrome secondary to alcohol abuse." Hoppe appeared to be hallucinating during questioning and at times would close his eyes and not respond to police officers. Treating physicians found that he was "in and out of consciousness," he had "short-term memory impairment," and that his "reasoning, judgment, and problem-solving abilities were impaired." *Id.* ¶ 11. Balancing these personal characteristics of Hoppe against the tactics used by police officers in questioning him, the court found that Hoppe's statements were involuntarily made. The police tactics exerted on Hoppe were not found to be "egregious or outrageous," but given Hoppe's physical and mental state, the court found that "subtle pressures are considered to be coercive if they exceed the defendant's ability to resist." *Id.* ¶ 46. The court further stated that "pressures that are coercive in one set of circumstances may be coercive in another set of circumstances if defendant's condition renders him uncommonly susceptible to police pressures." *Id.*

Practice Tip. Having the defendant's treating physicians or psychologists testify could be of benefit to proving involuntariness of confessions. Treating medical professionals can testify to the defendant's specific diagnosis and how that manifests in symptoms, and how that might "stack up" against coercive tactics by law enforcement officers, no matter what form they take. The defendant in *Hoppe* had the benefit of treating medical professionals as his witnesses. Hoppe's witnesses included the physician who was treating him during the interrogation and a physician who evaluated him after the interrogation. The court found Hoppe's statements to be involuntarily made based in part on the testimony of treating medical professionals.

D. Education and Intelligence [§ 6.30]

There is no bright-line rule about the levels of education and capacity for intelligence one must possess before a voluntary confession crosses the threshold into an involuntary one. Courts have acknowledged that "subnormal intelligence" is a factor but is not in and of itself a reason to call a confession involuntary, unless the difference from "normal intelligence" is "extreme." The term "extreme subnormal intelligence" was used by one court to describe individuals who are "incapable of understanding the meaning and effect of the statement or the waiver of constitutional rights." *See State v. Cumber*, 130 Wis. 2d 327, 332, 387 N.W.2d 291 (Ct. App. 1986).

E. Coercive Law Enforcement Tactics [§ 6.31]

In applying the balancing test for voluntariness, courts consider various tactics engaged in by law enforcement officers. There are no bright lines here. A tactic that may be considered coercive in one instance might not be considered coercive in another, as it depends on the balancing act against the defendant's personal characteristics. But some parameters can be discerned from case law.

Wisconsin courts do not favor long detentions, but in determining whether they are "unreasonable," consideration is given to their purpose. *See State v Herrington*, 41 Wis. 2d 757, 773, 165 N.W.2d 120 (1969); *Phillips v State*, 29 Wis. 2d 521, 533, 139 N.W.2d 41 (1966). In *Wagner v. State*, 89 Wis. 2d 70, 76, 80, 277 N.W.2d 849 (1979), a 27–28-hour detention of a suspect in a homicide case was not "unreasonably long" because the court found the detention was for a "proper purpose" and by implication, not merely coercive.

In *State v. Reynolds*, 2010 WI App 56, ¶ 21, 324 Wis. 2d 385, 781 N.W.2d 739, the Wisconsin Court of Appeals held that police tactics were not coercive in a case in which the in-custody defendant had been interviewed by police officers six times in the prior week and one detective gave a "speech" to the defendant that made the defendant cry. The court found that each individual interview was not "unduly long," and the detective's speech was not "overly manipulative." *Id.* ¶¶ 46, 50

The *Reynolds* court identified law enforcement tactics to be considered in assessing involuntariness, including the "length of the interrogation, any delay in arraignment, the general conditions under which the confessions took place, any excessive physical or psychological pressure…, any inducements, threats, methods or strategies utilized by the police to compel a response, and whether the individual was informed of his *Miranda* rights." *Id.* ¶ 39 (citation omitted).

The length of interrogation and the physical setting of the interrogation are not coercive law enforcement tactics per se, but it is important to consider these facts and relate them to the mental condition of the defendant. A defendant's mental condition may be adversely affected by the length of the interrogation, the physical setting, or other conditions of the interrogation beyond the actual questioning. The attorney should consider these facts through the filter of the defendant's mental condition and offer evidence relevant to these considerations during suppression hearings.

Courts have recognized the "psychological coercion inherent in custodial interrogation." *See State v Hockings*, 86 Wis. 2d 709, 719, 273 N.W.2d 339 (1979). The absence of physical pressure, restraints, or harm by law enforcement officers favors a finding of no coercion. *See Turner v. State*, 76 Wis.2d 1, 22-23, 250 N.W.2d 706 (1977); *Pontow v. State*, 58 Wis. 2d 135, 137, 205 N.W.2d 775 (1973). Misrepresenting the strength of the evidence or other law enforcement tricks and lies are factors to consider in the test for involuntariness but are not per se coercive. *See State v. Triggs*, 2003 WI App 91, ¶¶ 17–19, 264 Wis. 2d 861, 663 N.W.2d 396; *State v. Albrecht*, 184 Wis. 2d 287, 300, 516 N.W.2d 776 (Ct. App. 1994). Police representations that cooperation will help the defendant do not amount to coercion. *See State v. Cydzik*, 60 Wis. 2d 683, 211 N.W.2d 421 (1973).

Law enforcement officers testify at suppression hearings. Attorneys will often have recordings of the interrogation, but this is not always the case. In the absence of recordings of the interrogation, attorneys should look to the law enforcement reports, understanding that these reports merely paraphrase or summarize the interrogation from the perspective of the officer after the interrogation. During cross-examination, defense attorneys should endeavor to establish the specific tactics (including misrepresenting the evidence), words, and tone used by law enforcement officers in conducting their interrogation. Cross-examination can be informed by obtaining and reviewing any policies of a law enforcement department regarding custody and interrogation and through requests for information on any interrogation trainings attended by questioning officers. Once the attorney knows which trainings the law enforcement officers attended, materials related to the trainings can be obtained and reviewed in preparation for cross-examination. Knowledge of departmental policies and law enforcement trainings informs an attorney's knowledge about the interrogation tactics used by law enforcement officers and can illuminate how those tactics could coerce a defendant with mental conditions.

VII. Mental Illness and Witnesses [§ 6.32]

A. In General [§ 6.33]

This section considers issues involved with the competency of witnesses, lay testimony, expert testimony, and the procedure by which attorneys can move the court to order psychological evaluations of complaining witnesses.

B. Competency of Witnesses [§ 6.34]

A witness's testimony can be meaningfully received and evaluated only if the person is competent to be a witness. Competency of a witness in this context refers to the ability of a witness to perceive facts or information and the witness's ability to convey that information to the parties, court, or jury. Witness-competency issues arise when a witness has mental impairments or conditions or when the witness is a child. This section focuses on the competency of witnesses with mental conditions.

There is a presumption of witness competency under Wisconsin law. Wis. Stat. § 906.01 provides the following: "Every person is competent to be a witness except as otherwise provided in these rules." There is no threshold inquiry or determination of competency that must be made before a witness can testify. Witnesses are not per se incompetent merely because they have mental illnesses or cognitive deficits. *See Thomas v. State*, 92 Wis. 2d 372, 383, 284 N.W.2d 917 (1979).

The competency of a person to be a witness considers the person's (1) understanding of the oath and obligation to tell the truth and (2) capability of understanding the questions put to them and answering intelligently. "Intelligently" as used here does not mean the witness must convey testimony in a scholarly or polished way. Instead, "intelligently" as used in this context considers whether the testimony of the witness can be understood by the trier of fact. Competency considerations go to the weight and credibility of the testimony offered by the witness. *See State v. Hanna* 163 Wis. 2d 193, 206, 471 N.W.2d 238, (Ct. App. 1991). *See id.*

Competency of a witness continues to be presumed until it becomes an issue during testimony, at which time the court can examine the witness to determine their competency. Witness-competency objections must be made at trial, and failure to object waives future challenges. *See State v. Daniels*, 117 Wis. 2d 9, 17, 343 N.W.2d 411 (Ct. App. 1983). A defendant forfeits any challenge to the competency of witness if an objection is not made before receipt of testimony. *See State v. Olson*, 113 Wis. 2d 249, 253, 335 N.W. 2d 433, (Ct. App. 1983).

Note. Proposed witnesses who were intoxicated or impaired by drugs at the time of their perception of events will not thereby be considered incompetent to testify. Rather, the issue is the weight and credibility that should be given to their testimony. *See Tobar v. State*, 32 Wis. 2d 398, 403, 145 N.W.2d 782 (1966); *see also Ruiz v. State*, 75 Wis. 2d 230, 234–35, 249 N.W.2d 277 (1977).

C. Lay Testimony of a Witness [§ 6.35]

Opinion testimony of a nonexpert (lay) witness is considered in Wis. Stat. § 907.01, Opinion testimony may be offered by nonexpert (lay) witnesses if it is (1) "rationally based" on the witness's perception, (2) "helpful to a clear understanding of the witness's testimony or determination of a fact in issue," and (3) "not based on scientific, technical, or other specialized knowledge within the scope of a witness under [Wis. Stat. §] 907.02(1)." *See* Wis. Stat. § 907.01.

Wisconsin courts have held that lay opinion testimony is sufficient if the matter to be proved is within common knowledge and common comprehension. *See Vultaggio v. General Motors Corp.*, 145 Wis. 2d 874, 882, 429 N.W.2d 93 (Ct. App. 1988).

The mental illness or condition of a victim can be an element of the offense for certain crimes. To establish this element, the prosecution does not necessarily have to use expert testimony. Depending on the mental illness element to be proved, the prosecution can use lay testimony to establish that element. *See State v. Perkins*, 2004 WI App 213, ¶¶ 16–23, 277 Wis. 2d 243, 689 N.W.2d 684.

The court in *Perkins* considered a situation in which proving mental illness of the victim was part of the element of the crime charged. Perkins was charged with second-degree sexual assault of a mentally ill person. The state had the burden of proof beyond a reasonable doubt to show, in part, that the victim was mentally ill. The evidence offered to prove this element was the opinion of lay witnesses, not expert witnesses. The Wisconsin Court of Appeals held that expert testimony was not required to prove mental illness that resulted in the victim being "unable to appraise her conduct" and that this element could be established through lay opinion testimony. *Id.* ¶ 21. Although expert testimony is not required to prove the mental condition of a victim in certain criminal cases, the prosecution may still bring expert testimony if they wish, and in certain cases, expert testimony might be necessary, even though not strictly required under the law, to meet the prosecution's burden of proof.

D. Expert Testimony of a Witness [§ 6.36]

When mental illness or conditions are at issue in a case, it is likely that expert testimony will be a part of the evidence. Attorneys representing defendants with mental illness should be familiar with the issues involved in the admission of expert testimony. This section addresses the definition of expert testimony, when and how it can be admitted as evidence, and expert witness and testimony qualifications.

Expert testimony of a witness is defined in Wis. Stat. § 907.02. Such testimony is "scientific, technical, or other specialized knowledge" that will help the court or jury understand the evidence or determine a fact in issue. *See id.*

Since 2011, Wisconsin courts have used the *Daubert* reliability test to determine the admissibility of expert testimony. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Wisconsin codified the *Daubert* test in Wis. Stat. § 907.02(1). Expert testimony is admissible if "it is based on sufficient facts or data" and "is the product of reliable principles and methods," and "the witness has applied the principles and methods reliably to the facts of the case." Wis. Stat. § 907.02(1).

In *State v. Dobbs*, 2020 WI 64, 392 Wis. 2d 505, 945 N.W.2d 609, the Wisconsin Supreme Court considered another route for admissibility of expert testimony, notwithstanding the *Daubert* test. In *Dobbs*, the court held that expert testimony is admissible as "dissertation or exposition" testimony. *Id.* ¶ 33. If an expert's exposition testimony fits the particular facts of a case, it is admissible as "or otherwise" testimony but not as an expert opinion. This means that expert testimony can be used—if it fits the facts—to educate the jury about the area of expertise without giving opinions on the facts of the case. This exposition testimony does not have to be the "product of reliable principles and methods" as applied "reliably to the facts of the case." *Id.* ¶ 43 n.20. To offer this evidence, a party must meet preliminary questions of admissibility to a preponderance-of-the-evidence standard. These preliminary questions are "(1) whether the expert is qualified; (2) whether the testimony will address a subject matter on which the factfinder can be assisted by an expert; (3) whether the testimony is reliable; and (4) whether the testimony will 'fit' the facts of case." *Id.* ¶ 43. Determining whether exposition testimony fits the facts of the case is a matter of relevance, *see* Wis. Stat. § 904.01, and admitting it is discretionary. Although exposition testimony does not offer opinions on case facts, it still must be "sufficiently tied" to case facts in service of helping the jury "in resolving factual disputes." *Id.* ¶ 44. Exposition testimony does not "explicitly connect the witness's expertise to the particular facts of the case." *Id.*

Expert testimony is required when the matter to be proved is beyond the common knowledge and experience of "average" jurors and when the expert testimony will assist the jury in analyzing matters beyond "ordinary" comprehension. *See State v. Whitaker*, 167 Wis. 2d 247, 255, 481 N.W.2d 649 (Ct. App.1992); *State v. Blair*, 164 Wis. 2d 64, 75, 473 N.W.2d 566 (Ct. App. 1991). It is within the circuit court's discretion to determine whether expert testimony is required to assist the trier of fact. *See State v. Richardson*, 189 Wis. 2d 418, 424, 525 N.W.2d 378 (Ct. App. 1994). If evidence is complex or beyond the comprehension of the jury, a party can move the court to "keep the case from the jury unless expert testimony is provided." *State v. Kandutsch*, 2011 WI 78, ¶ 27, 336 Wis. 2d 478, 799 N.W.2d 865.

For a medical professional to testify on mental health matters, there is no requirement that the medical professional be credentialed as a psychologist or a psychiatrist. "Physicians and general practitioners who have made some study of insanity or have had some experience with mental [illness] cases are deemed qualified as experts" with respect to behavior of individuals with mental illness. *See State v. Elson*, 60 Wis. 2d 54, 68, 208 N.W.2d 363 (1973).

E. Motion for Psychological Evaluation of Complaining Witness and *Jensen* Evidence [§ 6.37]

In *State v. Jensen*, 147 Wis. 2d 240, 432 N.W.2d 913 (1988), the Wisconsin Supreme Court held that the prosecution can offer evidence to attempt to establish that the complainant's "reactive behavior" is consistent with the behavior of someone who has actually been the victim of that particular crime. This scenario typically arises in sexual assault cases with child witnesses but might also arise in other contexts. The court further determined that *Jensen* evidence—evidence offered to establish that the complaining witness' behavior is consistent with that of a victim of the crime—does not amount to vouching for the truthfulness of a witness. In *Jensen*, the Wisconsin Supreme Court simultaneously concluded that witnesses may not vouch for the truth-telling tendencies of other competent witnesses, while allowing the introduction of expert testimony to explain the meaning of a complaining witness's "post-assault behavior." *Id.* at 251.

Note. Witnesses may not testify that other mentally and physically competent witnesses are telling the truth. *See State v. Haseltine*, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984).

It is worth considering the facts of the *Jensen* case to illuminate the process for moving the court for a psychological evaluation of a complaining witness. The expert in *Jensen* was the child's school guidance counselor, who testified that he had attended seminars in which "red flags" were identified in the context of child sexual abuse victims. The alleged victim in *Jensen* was acting out sexually in school, her teachers referred her to the guidance counselor, and the guidance counselor asked the alleged victim whether she had ever been abused. She

affirmed this. The guidance counselor testified that the victim's sexual acting out was a "red flag" suggesting the child may have suffered sexual abuse. The defense maintained that this amounted to vouching for the truthfulness of the alleged victim, but the Wisconsin Supreme Court disagreed, saying that unlike in the *Haseltine* case, the counselor was not asserting explicitly that the victim was "being totally truthful" or that there was "no doubt whatsoever" that she was a victim of sexual abuse. The counselor was simply saying that the child's behavior was a red flag for someone who could have suffered sexual abuse. The court emphasized that the counselor's testimony was offered to describe the context in which the complaining witness first revealed the assault. The court held that the testimony was offered not to prove the truth of the allegation but to explain the context in which the child made her allegation. *Jensen*, 147 Wis. 2d at 249–51. The court also noted that this testimony was being offered to rebut the defendant's claim that the victim was fabricating the assault as part of a plan to be returned to her mother in California. This type of testimony is commonly referred to as "*Jensen* evidence."

Practice Tip. To counter *Jensen* evidence, the defendant can move the court for an order compelling the witness to submit to a psychological evaluation. To successfully compel a psychological evaluation of the complaining witness, the defense must show "a compelling need or reason for the psychological examination." *State v. Maday*, 179 Wis. 2d 346, 349, 507 N.W.2d 365 (Ct. App. 1993). The motion should include a request for all materials that the state's expert consulted and used in arriving at the expert's conclusions or opinions.

A court should consider the following when deciding the defendant's request: (1) the nature and potential intrusiveness of the examination; (2) the age of the alleged victim; (3) the potential effects of the examination on the alleged victim, both physical and emotional; (4) the examination's probative value to case issues; (5) the length of time between the alleged crime and the examination; (6) other evidence that is available to the defendant; and (7) whether a personal interview with the alleged victim is essential to the formation of an expert opinion. *Id.* at 360.

A court that orders an alleged victim to submit to the defense's request for a psychological examination has discretion to place limits or conditions on the exam to protect the victim. The court can dictate the "interview protocol," the length and location of the exam, the number of times the alleged victim may be interviewed, the number of experts who may perform the exam, whether or not the exam can be recorded, and whether the victim can be accompanied during the interview. *Id.* at 361. Reports generated pursuant to this order are discoverable.

An alleged victim has the right to refuse to participate in the ordered exam. Refusal to participate in the exam requested by the defense prohibits the prosecution from introducing behavioral evidence of the alleged victim through the *Jensen* expert. *Id.*

VIII. Obtaining Mental Health Records of a Party in Criminal Proceedings [§ 6.38]

Wis. Stat. § 905.04(2) provides that "[a] patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained … for purposes of diagnosis or treatment of the patient's … mental or emotional condition." Mental health records are kept confidential unless released by the patient or compelled to be released by the court.

Practice Tip. The most straightforward way an attorney can obtain mental health records of a party is by receiving consent of the party to do so. Consider this path of least resistance before filing motions with the court. For defense counsel, getting consent for a release of records of a client's mental health treatment should be easy: Ask the client to sign a release, and accomplish this as soon as it becomes apparent that mental health issues are relevant to the case.

Getting mental health treatment records for other parties will likely have more challenges. Before filing motions to compel these records, consider the nature of the relationship between the defendant and the other party for whom records are sought. If the other party is known to the defendant—for example, a relative, roommate, partner, or friend—carefully consider asking for a voluntary release of records. This is not to say that release in this way happens with frequency, but it is not rare or extremely unusual for other parties, including alleged victims, to be positively inclined toward the defendant. When approaching other parties for a release of mental health records, inform them that as the defendant's attorney, you represent the interests of your client and your client's interests alone. Be clear that you do not represent the interests of the person from whom you are seeking mental health records. Explain the general purpose for which you are requesting the records and how they may be used in the matter.

Absent a voluntary disclosure of records and before involving the court, the attorney should consider other ways in which the records or information about the records can be obtained. The records sought might also be available through regular discovery. Defense attorneys should file tailored discovery demands for all evidence that the prosecution holds in the matter, including mental health records. Certain other kinds of confidential records can be obtained through public records requests, but that is a highly unlikely avenue for obtaining a party's mental health records.

The effort to independently obtain records will be crucial to later motions to compel if needed, because defendants who ask courts to compel confidential records "must undertake reasonable investigation" into the "background" and "counseling" of other parties from whom records are sought before records will be made available. *See State v. Green*, 2002 WI 68, ¶ 33, 253 Wis. 2d 356, 646 N.W.2d 298.

In the absence of a voluntary release of mental health records, attorneys will have to move the court to compel disclosure. In Wisconsin, this motion is known as a motion for in-camera inspection. Making this motion becomes necessary when a party seeks to introduce evidence of a confidential nature that they do not possess, such as mental health treatment records. An in-camera inspection motion asks the court to order an individual to disclose confidential records to the court for review. An in-camera review means the judge reviews the confidential records unilaterally, without disclosure to the prosecution or defense counsel. A balancing test accompanies consideration of this motion, which aims to balance the due-process right of a defendant to a complete defense with the privacy interests of the subject whose records are sought. Upon review, the court decides whether the records contain information that is either (1) material or relevant to the defense or (2) necessary to a fair determination of guilt or innocence. If the reviewing judge determines that the records are necessary to a fair determination of guilt or innocence, the records must be disclosed to defense counsel and the defendant for examination and use at trial or in other litigation. *See State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (1993), *abrogated on other grounds by Green*, 2002 WI 68, 253 Wis. 2d 356.

In moving the court for in-camera inspection, the defense must show "a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence." *See Green*, 2002 WI 68, ¶ 34, 253 Wis. 2d 356. Relevant necessary information means the kind of information that "tends to create a reasonable doubt that might not otherwise exist." *Id.* This can include confidential records of witnesses and alleged victims.

Obtaining records independent of this motion when possible and as discussed above is preferred, because moving the court to disclose the records leaves it to the judge's discretion. The court could deny the motion or limit the records' use in a way the defense finds ineffectual.

For defense counsel to make a showing of materiality or relevance necessarily means that they will have to reveal their defense strategy to some degree. It is important for defense counsel to have a solid sense of the case and the facts needed to illuminate the defense. This knowledge will inform the request for records and result in defense counsel being able to assert which records are needed. It is likely that defense counsel will not know precisely what the records contain, but if possible, investigatory efforts should be made about the individual for whom the records are sought, so the motion to compel can be better articulated. To successfully move the court to release confidential records, defense counsel needs to assert the materiality and relevance to the asserted defense of the records sought.

Practice Tip. Before moving the court for an in-camera inspection, defense counsel should investigate the individual for whom records are sought as much as possible. As with any aspect of quality defense representation, good communication with the defendant-client is the starting point for investigatory efforts. Talk to and listen to the defendant-client. Get the defendant-client's version of events. Often, individuals for whom records are sought—be they witnesses or alleged victims—are known to the defendant-client. The defendant will likely have some familiarity with the individual for whom mental health records are being sought. Ask the defendant-client what they know about the individual's mental conditions and mental health history or treatment. From there, more investigation can be developed, and more information can be sought through means other than moving the court to compel records. This can potentially lead to interviews of additional witnesses or requesting records regarding the individual that are not confidential, such as police reports or other publicly available records.

The attorney should not overlook already received discovery. A careful review of existing evidence might lead to other information in support of the motion for in-camera inspection. The attorney should review discovery for any information regarding the mental health of the complainant and other witnesses. This information may be contained in

- Written and oral statements of witnesses;
- Audiorecordings or videorecordings from law enforcement related to the investigation, including law enforcement recordings of witness interviews;
- 911 calls;
- Dispatch records and computer-aided dispatch calls; and
- Law enforcement reports about the incident.

Practice Tip. Consider making additionally tailored discovery demands to ensure that everything the prosecution has was provided to defense counsel.

Defense counsel is prohibited from moving the court to compel records based on fishing expeditions or hunches about that the records might contain. Defense counsel will need to base the motion for in-camera inspection on concrete facts to meet the burden of proof and successfully move the court. If the individual for whom records are sought is not known to the defendant-client, defense counsel will have to gather information about them from other sources. A great deal of information can be obtained from social media accounts and public

records. Defense counsel might want to attempt to interview the individual for whom records are sought or their family, friends, coworkers, or acquaintances. This task can be subcontracted to investigators who clearly identify that they are working for the interests of the defendant. Defense counsel and defense investigators should always be respectful and clear about the interests they represent when approaching interviews with potential witnesses or the alleged victim.

Upon gathering all possible information short of the compelled records, defense counsel is best positioned to make their motion to the court. The motion should assert facts in support of the defendant's required burden of proof. The motion should assert that the requested records are material and relevant to the evidence and defense and that the records have a reasonable likelihood of containing information necessary to the determination of the defendant's guilt or innocence. The motion should include reference to discovery materials and known evidence such as police reports or recordings or other materials generated by law enforcement investigations. The motion can be supplemented with affidavits of counsel, investigators, and witnesses to assert additional information that the defense investigation has revealed. The attorney should be prepared to allow access by the prosecution to these asserted witnesses.

IX.
Conclusion [§ 6.39]

Attorneys representing clients with mental illness should consider how the condition bears on various aspects of the representation and process of the criminal case. Mental illness can affect attorney-client communication, how the client experienced law enforcement contact, the client's ability to participate in the criminal legal process, and ultimately whether the client can be held criminally responsible for the crimes charged. Attorneys will need to consider the extent to which mental illness bears on the case and proceedings, while making adjustments in attorney-client communication to accommodate clients with mental illness.

Attorneys should familiarize themselves generally with common mental disorders and the kinds of treatment and medications to treat mental illness, including treatment efficacy and possible side effects. If a client authorizes a release of information, the client's treatment providers and trusted family and friends can be valuable sources of information to deepen an attorney's understanding of a client's mental condition. Mental health advocacy groups such as NAMI and Disability Rights Wisconsin are informative general resources on mental illness.

Mentally ill defendants are among the most vulnerable people in the criminal justice system. They have likely been repeatedly dismissed, misunderstood, or not taken seriously by the world around them because of their illness. Attorneys representing clients with mental illness have a duty to ensure that the client's perspectives and stories are seen and heard in the criminal justice system. Attorneys should give them quality representation—and a voice in the process.

Representing mentally ill defendants can be challenging, but extremely rewarding, work. As counsel for mentally ill defendants in criminal cases, attorneys can ensure that these members of a vulnerable population are seen and heard throughout the criminal legal process. Attorneys can ensure that mentally ill clients have agency in decisions about their cases and that the goals of representation set by defendants are met. Attorneys play an important role in ensuring that defendants with mental illness are heard, respected, and understood throughout the criminal legal process.

Chapter 7
Legal Duties and Responsibilities of Mental Health Professionals

Amanda Pirt Meyer

I. Malpractice [§ 7.1]

A. In General [§ 7.2]

Malpractice by any skilled professional is a primary ethics concern. Mental health professionals, like legal professionals, must conform to a code of professional conduct. Failure to acknowledge and conform to such code may harm both the patient and the provider. This chapter covers the Wisconsin Administrative Code provisions that are relevant to psychologists and social workers. A brief overview of Wisconsin's medical malpractice laws follows. [6]

B. Malpractice Defined [§ 7.3]

1. In General [§ 7.4]

Legal malpractice is defined as "[a] lawyer's failure to render professional services with the skill, prudence, and diligence that an ordinary and reasonable lawyer would use under similar circumstances." *Legal malpractice*, Black's Law Dictionary (11th ed. 2019). How is malpractice defined by mental health professionals? Malpractice is viewed more in terms of negligence—unprofessional conduct is prohibited. Similar to the ethics rules applicable to lawyers, psychologists and social workers are required to follow codes of professional conduct. Wisconsin statutes do not specifically contain ethical obligations for mental health providers. In the recent past, Wis. Stat. § 455.08 directed the psychology examining board to develop a reasonable code of ethics governing the professional conduct of psychologists and modeled on the "Ethical Standards of Psychologists" developed by the American Psychological Association. Pursuant to that directive, Wis. Stat. § 15.405(10m) created the Wisconsin Psychology Examining Board in the Department of Safety and Professional Services. Wis. Stat. § 455.08 was repealed by 2021 Wis. Act 22, effective June 1, 2021. Legislative documents reveal the desire to repeal this statute as duplicative to licensing obligations for mental health providers.

A similar statute—Wis. Stat. § 457.03(2)—has directed the Marriage and Family Therapy, Counseling, and Social Worker Examining Board to develop a code of ethics. Although this directive is not affected by 2021 Wis. Act 22, at the time of publication of this book, a bill was pending that would renumber and amend the statute. 2021 Wis. SB 31 has been referred to committee as 2021 Assemb. B. 14. The proposal seeks to stop the board from citing specific conduct, including conversion therapy, as unprofessional. At the time of publication of this book, the American Association for Marriage and Family Therapy, Fair Wisconsin Inc., the National Association of Social Workers–Wisconsin Chapter, and the Wisconsin Coalition Against Sexual Assault had all noted their opposition. *See* Wis. Ethics Comm'n, *Eye on Lobbying*, Legislative Bill/Resolution, 2021-2022 Legislative Session, Senate Bill 31, https://lobbying.wi.gov/What/BillInformation/2021REG/Information/18308 (last visited May 4, 2021).

2. Psychologists [§ 7.5]

Psychiatrists, as medical doctors, must conform to the medical code of ethics. Psychiatric conduct is discussed extensively by the American Psychiatric Association in its publication *American Psychiatric Association's Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry* (2013), https://www.psychiatry.org/psychiatrists/practice/ethics. Medical malpractice is examined in section (B).

The Wisconsin Psychology Examining Board's efforts are evident in Wis. Admin. Code chs. Psy 2–4 (setting forth requirements) and ch. Psy 5 (addressing conduct). Wis. Admin. Code § Psy 5.01 lists 37 acts that are prohibited. Complaints regarding such acts "shall be investigated" and may lead to disciplinary proceedings. The Wis. Admin. Code ch. Psy requirements parallel the rules of professional conduct for lawyers, which also identify acts or actions that are required as well as those that are strictly forbidden.

The following acts of unprofessional conduct are prohibited:

(1) Engaging in false, fraudulent, misleading or deceptive advertising, or maintaining a professional relationship with one engaging in such advertising.
(2) Gross negligence in the practice of psychology or private practice of school psychology.
(2m) Engaging in conduct that falls below the standard of minimal competence within the practice of psychology or school psychology.
(3) Misrepresentation of professional competency by offering to perform services that are unwarranted on the basis of education, training, or experience.
(4) Performance of professional services inconsistent with training, education, or experience.
(5) Conviction of a crime or violation of any law the circumstances of which substantially relate to the circumstances of the practice of psychology or private practice of school psychology.
(6) Undertaking or continuing professional services after having been adjudged incompetent by a court of law.
(7) Reporting distorted, erroneous, or misleading psychological information.
(8) Engaging in false, fraudulent, exploitative, misleading, or deceptive billing practices.
(9) Allowing professional judgment to be controlled by another.
(10) Aiding or furthering discrimination on the basis of race, color, sex, creed, national origin, ancestry, handicap or sexual orientation by means of service given to a client.
(11) Practicing or attempting to practice while the licensee has a physical or mental impairment, including impairment related to alcohol or other drugs, which is reasonably related to the licensee's ability to adequately undertake the practice of psychology in a manner consistent with the safety of client or public.

(12) Revealing facts, data, information, records or communication received from a client in a professional capacity except in the following circumstances:
  (a) With the informed consent of the client or the client's authorized representative.
  (b) With prior notification to the client at the time the information was elicited of the use and distribution of the information.
  (c) If necessary to prevent injury to the client or another person.
  (d) Pursuant to the lawful order of a court of law.
  (e) Use of case history material for teaching or research purpose, or in textbooks or other literature, provided that proper precautions are taken to conceal the identity of the client.
  (f) Where otherwise permitted or required under ss. 51.30 and 146.82, Stats.
  (g) When required by federal or state law.

(12m) Failing to have security protocols for access to facts, data, information, records, or communication received from a client in a professional capacity.

(13) Failure to obtain written, informed consent from the client or client's legal representative prior to the use of observation or electronic taping, recording or filming procedures.

(14) Engaging in sexual contact, sexual conduct, kissing, or any other behavior which could reasonably be construed as seductive, romantic, harassing, or exploitative, with any of the following:
  (a) A client.
  (b) A former client within 2 years of termination of professional services.
  (c) A former client beyond 2 years of termination of professional services, unless the licensee can demonstrate that there has been no exploitation of the former client, and that the former client is not vulnerable by reason of emotional or cognitive disorder to exploitive influence by the psychologist, in light of all relevant factors, including:
    1. The length of time which had passed between the termination of professional services and the conduct.
    2. The nature and duration of the professional services.
    3. The circumstances of termination.
    4. The client's personal history.
    5. The client's mental status at the time the conduct took place.
    6. The likelihood of adverse impact on the client or others.
    7. Statements or actions made by the licensee during the course of professional services suggesting or inviting the possibility of a post-termination sexual or romantic relationship with the client.
  (d) A person to whom the licensee is providing teaching, supervisory or other instructional services.

(14m) Accepting as a client a person with whom the licensee has engaged in sexual contact or sexual conduct.

(15) Failure to provide clients a description of what may be expected in the way of tests, consultation, reports, fees, billing, therapeutic regimen or schedule.

(16) Failure to provide clients a description of possible effects of proposed treatment.

(17) Engaging in any prohibited dual relationship or any relationship which is reasonably likely to impair the licensee's objectivity in providing professional services.

(19) Employing or claiming to have available secret techniques or procedures that the licensee refuses to divulge.

(20) Engaging in experimental treatment or services without assuring objectivity through keeping adequate records and consulting with colleagues.

(21) In the conduct of research, failure to inform study participants of all features of the research that might reasonably be expected to influence willingness to participate; failure to ensure as soon as possible participants' understanding of the reasons and justification for methodological requirements of concealment or deception in the study; failure to protect participants from physical or mental discomfort, harm or danger, or to notify the participant of such danger; and failure to detect and remove any undesirable consequences to the participants resulting from research procedures.

(22) Failure to inform the client of financial interests which are not obvious and which might accrue to the licensee for referral to or for any use of service, product, or publication.

(23) Refusal upon request to advise the board of the nature of the specialties included within the licensee's practice.

(24) Failure to respond honestly and in a timely manner to a request for information by the board. Taking longer than 30 days to respond creates a rebuttable presumption that the response is not timely.

(25) Appropriation of the identity of another person holding a license issued by this or another board.

(26) Allowing another person to use one's license.

(27) Using fraud or deception in applying for a license.

(28) Violation of ch. 455, Stats., or any rule promulgated by the board.

(29) Failure to notify the board within 30 days of any disciplinary or adverse action taken by any other jurisdiction against a license, certificate, permit or registration granted for the practice of psychology or school psychology.

(30) For licensees of the board who are employed by a public agency and who also offer their services privately:
  (a) Failure to inform the client that the client is entitled to the same service from the public agency.
  (b) Failure to inform the client that the licensee is an employee of that same public agency.

(c) Failure to avoid any prohibited dual relationship or any relationship which is reasonably likely to impair the licensee's objectivity in providing professional services.

(31) Failure to notify clients when service will be interrupted or terminated.

(32) Having a credential granted by another jurisdiction to practice psychology or school psychology denied, limited, suspended, surrendered, or revoked, or otherwise disciplined or adverse action taken, whether or not accompanied by findings of negligence or unprofessional conduct.

(33) Failure to maintain adequate records relating to services provided to a client in the course of a professional relationship. Each patient record entry shall be dated, shall identify the treating psychologist, and shall be sufficiently legible to be understood and to allow interventions by other professionals. Unless records are subject to a different records retention policy by an entity with an obligation to maintain treatment records, a licensee shall retain treatment records for at least 7 years.

(34) Violating any provision of an order of any board or jurisdiction that regulates the practice of psychology or school psychology.

Wis. Admin. Code § Psy 5.01.

3. Social Workers [§ 7.6]

The Marriage and Family Therapy, Counseling, and Social Worker Examining Board governs social workers' conduct in Wis. Admin. Code ch. MPSW 20. While the board does not specifically define malpractice, it defines *gross negligence* as

> the performance of professional services that does not comply with an accepted standard of practice that has a significant relationship to the protection of the health, safety or welfare of a patient, client, or the public, and that is performed in a manner indicating that the person performing the services knew or should have known, but acted with indifference to or disregard of, the accepted standard of practice.

Wis. Admin. Code § MPSW 20.01.

Unprofessional conduct includes engaging in, attempting to engage in, or aiding or abetting the following conduct:

(1) Performing or offering to perform services for which the credential holder is not qualified by education, training or experience.

(2) Violating a law of any jurisdiction, the circumstances of which substantially relate to the practice under the credential.

(3) Undertaking or continuing performance of professional services after having been adjudged incompetent by any court of law.

(4) Using fraud or deception in the application for a credential.

(5) Using false, fraudulent, misleading or deceptive advertising, or maintaining a professional relationship with one engaging in such advertising.

(6) Engaging in false, fraudulent, deceptive or misleading billing practices.

(7) Reporting distorted, false, or misleading information or making false statements in practice.

(8) Discriminating on the basis of age, race, color, sex, religion, creed, national origin, ancestry, disability or sexual orientation by means of service provided or denied.

(9) Practicing or attempting to practice while the credential holder is impaired due to the utilization of alcohol or other drugs, or as a result of an illness which impairs the credential holder's ability to appropriately carry out the functions delineated under the credential in a manner consistent with the safety of a client, patient, or the public.

(10) Revealing facts, data, information, records or communication received from a client in a professional capacity, except in the following circumstances:

(a) With the informed consent of the client or the client's authorized representative;

(b) With notification to the client prior to the time the information was elicited of the use and distribution of the information; []

(c) If necessary to prevent injury to the client or another person;

(d) Pursuant to a lawful order of a court of law;

(e) Use of case history material for teaching, therapeutic or research purposes, or in textbooks or other literature, provided that proper precautions are taken to conceal the identity of the client; or

(f) When required pursuant to federal or state statute.

(11) Engaging in sexual contact, sexual conduct, or any other behavior with a client which could reasonably be construed as seductive. For purposes of this rule, a person shall continue to be a client for 2 years after the termination of professional services.

(12) Failing to provide the client or client's authorized representative a description of what may be expected in the way of tests, consultation, reports, fees, billing, therapeutic regimen or schedule.

(13) Failing to avoid dual relationships or relationships that may impair the credentialed person's objectivity or create a conflict of interest. Dual relationships prohibited to credentialed persons include the credentialed person treating the credentialed person's employers, employees, supervisors, supervisees, close friends or relatives, and any other person with whom the credentialed person shares any important continuing relationship.

(14) Failing to conduct an assessment, evaluation, or diagnosis as a basis for treatment consultation.

(15) Employing or claiming to have available secret techniques or procedures that the credential holder refuses to divulge.

(16) In the conduct of research, failing to inform study participants of all features of the research that might reasonably be expected to influence willingness to participate; failure to ensure as soon as possible participants' understanding of the reasons and justification for methodological requirements of concealment or deception in the study; failure to protect participants from physical or mental discomfort, harm or danger, or to notify the participant of such danger; and failure to detect and remove any undesirable consequences to the participants resulting from research procedures.

(17) Failing to inform the client of financial interests which are not obvious and which might accrue to the credential holder for referral to or for any use of service, product or publication.

(18) Failing to maintain adequate records relating to services provided a client in the course of a professional relationship. A credential holder providing clinical services to a client shall maintain records documenting an assessment, a diagnosis, a treatment plan, progress notes, and a discharge summary. All clinical records shall be prepared in a timely fashion. Absent exceptional circumstances, clinical records shall be prepared not more than one week following client contact, and a discharge summary shall be prepared promptly following closure of the client's case. Clinical records shall be maintained for at least 7 years after the last service provided, unless otherwise provided by federal law.

(19) Violating any of the provisions of ch. 457, Stats.

(20) Failing to notify the board that a license, certificate or registration for the practice of any profession previously issued to the credential holder has been revoked, suspended, limited or denied, or subject to any other disciplinary action by the authorities of any jurisdiction.

(21) Failing to make reasonable efforts to notify a client or a client's authorized representative when professional services will be interrupted or terminated by the credential holder.

(22) Gross negligence in practice in a single instance, or negligence in practice in more than one instance.

(23) Having a license, registration, or certificate permitting the practice of marriage and family therapy, professional counseling, or social work, or authorizing the use of the title "marriage and family therapist," "professional counselor," "social worker", or similar terms revoked, suspended, limited, or subjected to any other discipline, by any other jurisdiction.

Wis. Admin. Code § MPSW 20.02.

C. Torts—Wisconsin Medical Malpractice Laws: Wis. Stat. Ch. 893 (Damages), Including Statutes of Limitation [§ 7.7]

Medical malpractice—injury to the person—is a difficult (i.e., expensive) and narrow area of tort practice in Wisconsin. Medical malpractice claims are governed by Wis. Stat. § 893.55, which is well known to be sympathetic to medical providers rather than injured patients. For example, the statute caps noneconomic damages at $750,000, applicable to each occurrence. Wis. Stat. § 893.55(1d)(b). The term *noneconomic damages*

> means moneys intended to compensate for pain and suffering; humiliation; embarrassment; worry; mental distress; noneconomic effects of disability including loss of enjoyment of the normal activities, benefits and pleasures of life and loss of mental or physical health, well-being or bodily functions; loss of consortium, society and companionship; or loss of love and affection.

Wis. Stat. § 893.55(4)(a). The Wisconsin Supreme Court upheld the $750,000 cap in a 5–2 decision. *Mayo v. Wisconsin Injured Patients & Families Fund*, 2018 WI 78, 383 Wis. 2d 1, 914 N.W.2d 678. Further, the cap imposed when the provider is an employee of the state (there, the University of Wisconsin health-care system) is even lower—at $250,000—because it is a public system. That cap was set by the legislature in 1979 and, despite numerous challenges, has never been amended.

In addition to the cap, Wisconsin requires physicians to contribute to an Injured Patients and Families Compensation Fund and maintain active malpractice insurance coverage. Wis. Stat. ch. 655; *see also* Wis. Stat. § 893.55(5)(a). The legislature created the fund, originally known as the Patients Compensation Fund, in 1975 to respond to a perceived medical malpractice crisis. *Wisconsin Patients Comp. Fund v. Wisconsin Health Care Liab. Ins. Plan*, 200 Wis. 2d 599, 607, 547 N.W.2d 578 (1996). Since its inception in 1975, through June 2018, the fund has paid on only 673 claims with total payout of $874.9 million. State of Wis., Off. of Comm'r of Ins., *Injured Patients and Families Compensation Fund, FY 2015-16, FY 2016-17, and FY 2017-18* at 5 (June 2019), https://legis.wisconsin.gov/lab/media/2878/19-9full.pdf. According to the audit released by the state in mid-2019, the fund had a surplus of $1 billion dollars, which was approximately $647 million in excess of the recommended balance. *Id.*at 11.

The time limits, or statutes of limitation, that apply to injury claims are set forth in Wis. Stat. § 893.55.

- An action to recover damages for injury arising from any treatment or operation performed by, or from any omission by, a person who is a health-care provider, must be commenced within the later of
  - Three years from the date of injury, Wis. Stat. § 893.55(1m)(a); or
  - One year from the date the injury was discovered or, in the exercise of reasonable diligence should have been discovered, except that an action may not be commenced more than five years from the date of the act or omission, Wis. Stat. § 893.55(1m)(b).

- If a health-care provider conceals from a patient a prior act or omission of the provider that has resulted in injury to the patient, an action must be commenced within one year from the date the patient discovers the concealment, or, in the exercise of reasonable diligence, should have discovered the concealment or within the time limitation provided by Wis. Stat. § 893.55(1m), whichever is later. Wis. Stat. § 893.55(2).
- When a foreign object that has no therapeutic or diagnostic purpose or effect has been left in the body of a patient, an action must be commenced within one year after the patient is aware or, in the exercise of reasonable care, should have been aware of the presence of the object or within the limitation provided by Wis. Stat. § 893.55(1m), whichever is later. Wis. Stat. § 893.55(3).

Perhaps the most difficult element to prove for recovery relating to a mental health-care injury is the injury itself. Traditionally, injury has encompassed largely physical harm. Consider improper treatment, retained tools or equipment post-surgery, removing the wrong extremity, wrongful death, and wrong diagnoses. A physical injury is not required, but an injury must be recognized and documented. Notably, there are specific instances of mental health torts noted in the statutes—sexual exploitation and sexual abuse.

These injuries have become more well known due to the recent, and well-reported, sexual abuse scandal within the Catholic Church. Victims may ask that criminal charges be brought, or they may sue for damages in civil court. As distinct paths of recourse, there are separate statutes of limitation that apply. For criminal actions involving sexual contact or sexual intercourse with a minor younger than 13, there is no statute of limitation. Wis. Stat. § 939.74(2)(a)1., 2. For alleged victims who were younger than 16 when the sexual contact or intercourse occurred, a criminal action must be brought before the alleged victim turns 45 years old. Wis. Stat. § 939.74(2)(c). An action to recover civil damages for an injury arising from the sexual assault of a child must be initiated before the injured party reaches age 35. Relevant cases and their holdings are as follows and are annotated to Wis. Stat. § 893.54.

- *John Doe 1 v. Archdiocese of Milwaukee*, 2007 WI 95, 303 Wis. 2d 34, 734 N.W.2d 827.
  Claims for injuries against the Archdiocese of Milwaukee were not barred, because the statute of limitation in Wis. Stat. ch. 893 was inapplicable to fraudulent misrepresentation. The diocese had alleged that it did not know priests it assigned for service had histories of abuse of children and further alleged that it was unaware these priests were dangerous to children.

- *Doe v. Archdiocese of Milwaukee*, 211 Wis. 2d 312, 565 N.W.2d 94 (1997).
  A claim of repressed memory of past sexual abuse does not indefinitely toll the statute of limitation, and the recently arisen memories did not delay the accrual of the action.

- *Joseph W. v. Catholic Diocese of Madison*, 212 Wis. 2d 925, 569 N.W.2d 795 (Ct. App. 1997).
  Claims of parents' injury resulting from sexual abuse of their children accrue at the same time as the child's, even though the parents learned of the abuse much later.

Sexual exploitation by a therapist is specifically addressed in Wis. Stat. § 893.585, and claims for damages must be filed within three years after the alleged illegal behavior occurs. That limitation period is extended for individuals who may be unable to bring an action "due to the effects of the sexual contact or due to any threats, instructions, or statements from the therapist," and "the period of inability is not part of the time limited for the commencement of the action, except that this subsection shall not extend the time limitation by more than 15 years." Wis. Stat. § 893.585(2).

Other important tort considerations and questions include the following:

- Comparative negligence is applied in medical malpractice claims. *See* Wis. Stat. § 895.045. In evaluating damages, the negligent provider must be at least 51% at fault; any percentage of fault assigned to the injured party will result in a proportional award reduction. *Id.*

- Who may bring an action? This too is dictated by statute. In the 1970s, case law dictated that for a wrongful death claim, the surviving spouse and minor children were able to bring separate actions. *Jelinek v. St. Paul Fire & Cas. Ins. Co.*, 182 Wis. 2d 1, 512 N.W.2d 764 (1994). Similarly, a spouse's loss of consortium claim is a distinct claim. *Schwartz v. Milwaukee*, 54 Wis. 2d 286, 195 N.W.2d 480 (1972). *Jelinek* was superseded by the amendment of Wis. Stat. § 895.04, which now provides that an action may be brought by the decedent's personal representative or "by the person to whom the amount recovered belongs." In some instances, a special administration may be opened specifically to pursue the claim. The statute also dictates that separate actions brought for the same wrongful death will be consolidated, unless a single judgment would extinguish liability for the death. Wis. Stat. § 895.04(3).

- Claims against governmental bodies and officers have additional requirements, as noted in Wis. Stat. § 893.80, including an obligation for the potential plaintiff to provide written notice of the circumstances of the claim to the governmental body or officer

within 120 days after the happening of the event giving rise to the claim.

- The relationship between the injured patient and provider is examined in medical malpractice claims against caregivers. A patient-caregiver relationship must exist. For more information regarding the reporting and investigation of caregiver misconduct, please review Wis. Admin. Code ch. DHS 13.

II. Informed Consent [§ 7.8]

A. Informed Consent Defined [§ 7.9]

The term "informed consent" may appear to have a simple definition: You tell someone something, then they say yes or no. However, the concept of informed consent is much more nuanced: What was the patient told? Did the patient understand it? What should the patient have been told? Is it a yes-or-no question, or are there more choices? What if the patient changes his or her mind? What if the decision-maker is 14 years old? What if the patient was forced to make a decision? While the definitions of informed consent do provide additional explanation, relevant case law provides more answers to these questions.

In the informed consent context, when examining what the provider should have told the patient, one should consider what a reasonable person in that patient's place would want to learn. This is also true of how much information a provider should deliver to the reasonable person. This standard is also referred to as the lay standard, because it considers what information a layperson might want, understand, or consider essential to make a decision. It is important to remember that the reasonableness of the patient is distinct from the reasonableness of the provider.

The inquiry begins with reviewing three pertinent definitions. Two are from the Wisconsin statutes—one pertains to consent by the patient for treatment, and the other governs informed consent regarding medical records. The third is from the Wisconsin Administrative Code and also addresses informed treatment choices.

- Wis. Stat. *§ 448.30 (see also* Wis. Admin. Code *§ Med 18.03, which contains a shorter definition)*.

Any physician who treats a patient shall inform the patient about the availability of reasonable alternate medical modes of treatment and about the benefits and risks of these treatments. The reasonable physician standard is the standard for informing a patient under this section. The reasonable physician standard requires disclosure only of information that a reasonable physician in the same or a similar medical specialty would know and disclose under the circumstances. The physician's duty to inform the patient under this section does not require disclosure of:

(1) Detailed technical information that in all probability a patient would not understand.
(2) Risks apparent or known to the patient.
(3) Extremely remote possibilities that might falsely or detrimentally alarm the patient.
(4) Information in emergencies where failure to provide treatment would be more harmful to the patient than treatment.
(5) Information in cases where the patient is incapable of consenting.
(6) Information about alternate medical modes of treatment for any condition the physician has not included in his or her diagnosis at the time the physician informs the patient.

- Wis. Stat. *§ 51.30(2)*.

An informed consent for disclosure of information from court or treatment records to an individual, agency, or organization must be in writing and must contain the following: the name of the individual, agency, or organization to which the disclosure is to be made; the name of the subject individual whose treatment record is being disclosed; the purpose or need for the disclosure; the specific type of information to be disclosed; the time period during which the consent is effective; the date on which the consent is signed; and the signature of the individual or person legally authorized to give consent for the individual.

- *Wis. Adm. Code § DHS 94.02(22)*.

"Informed consent" or "consent" means written consent voluntarily signed by a patient who is competent and who understands the terms of the consent, or by the patient's legal guardian or the parent of a minor as permitted under s. 51.61(6) and (8), Stats., without any form of coercion, or temporary oral consent obtained by telephone in accordance with s. DHS 94.03 (2m).

Members of recognized religious organizations who refuse to give consent for treatment based on tenets of their religion are allowed to do so by statute. Wis. Stat. § 51.61(1)(h). Those individuals may refuse except when the treatment has been ordered by the court or is

necessary to prevent "serious physical harm to others as evidenced by a recent overt act, attempt or threat to do such harm." *Id.*

B. When Informed Consent Is Required [§ 7.10]

Patients must be provided with written, informed consent for

- Any service that will be billed by the facility;
- All medication (unless court ordered);
- Experimental research or treatment;
- Drastic treatment procedures, such as psychosurgery;
- Release of treatment records (though exceptions exist);
- Filming or taping; and
- Usual and customary treatment.

See Wis. Stat. § 51.61.

In the world of informed consent, the nuances of the law and its requirements are more easily understood when coming from case law.

- *What was the patient told?* Physicians must inform a patient whether there are alternative methods of diagnosing and treating a condition. *Martin v. Richards*, 192 Wis. 2d 156, 531 N.W.2d 70 (1995). The physician should also inform the patient of the benefits and risks of the treatments. *Bubb v. Brusky*, 2009 WI 91, 321 Wis. 2d 1, 768 N.W.2d 903.

- *Who must obtain the consent?* If an independent physician is performing a procedure at a hospital, informed consent must be obtained by the physician; the hospital does not have a separate obligation to obtain informed consent. *Mathias v. St. Catherine's Hosp., Inc.*, 212 Wis. 2d 540, 569 N.W.2d 330 (Ct. App. 1997).

- *What if the patient changes his or her mind?* Patients may withdraw their consent. If consent is withdrawn, the physician must then obtain informed consent to continue the procedure. *Schreiber v. Physicians Ins. Co.* 223 Wis. 2d 417, 588 N.W.2d 26 (1999). Further, any time there is a substantial change in circumstances, the physician should initiate a new informed consent discussion. *Hageny v. Bodensteiner*, 2009 WI App 10, 316 Wis. 2d 240, 762 N.W.2d 452.

- *Are there any defenses?* Under limited circumstances, the patient's contributory negligence may be a defense in an informed consent action. *Brown v. Dibbell*, 227 Wis. 2d 28, 595 N.W.2d 358 (1999).

C. Minors and Informed Consent [§ 7.11]

Minors' consent has been a contentious subject for many years—specifically for those children who are 14 years old or older. Consent differs depending on the treatment sought and the age of the minor.

Treatment Sought	**Consent**
Outpatient mental health care	The statute currently provides (and has for many years) that for minors age 14 or older, both the child *and* the child's parent or guardian must provide consent for mental health treatment for the minor. If a child 14 years old or older refuses admission, the child may receive outpatient treatment for up to 30 days; during that time the outpatient service director must ("shall") file a petition for review, and a hearing will be held. For children younger than 14, their opposition to treatment should be noted on the face of the admission application, but their consent is not required for treatment. Wis. Stat. §§ 51.13(1)(a), (1)(b), (4), 51.138(3), 51.14(3)(a).
Substance use	Because the parent or guardian completes the application for admission to inpatient treatment for substance abuse, there is no ability for the minor to consent. The age of the child does not change this result. If the child opposes admission, that position should be indicated on the admission application; for children 14 or older, the opposition should also be noted in the petition for review. Wis. Stat. § 51.13(1)(bm), (4).

Alcoholism and substance abuse	Treatment for alcoholism is addressed separately from substance abuse. The age dividing line is 12 years in this instance. For minors younger than 12, health-care providers may administer treatment with consent from the minor if a parent or guardian cannot be found. The parent or guardian should be sought for notification as soon as possible. Children age 12 or older can provide consent without parental or guardian consent for administration of limited services, including preventive, diagnostic, assessment, evaluation, or treatment services. Consent by the parent or guardian *is* required for surgical procedures (other than life-saving procedures), administration of a controlled substance (excluding detoxification), admission for inpatient care (unless for detoxification), and any inpatient care that extends beyond 72 hours. Wis. Stat. §§ 51.45, 51.47(1).
Developmental disabilities	For minors younger than 14, a parent or guardian must consent to inpatient treatment for developmental disability. For minors 14 or older, *both* must agree to the admission and treatment. If a minor age 14 or older disagrees with the admission, that opposition should be noted on the face of the application. Wis. Stat. § 51.14(4)(b).

D. Consent, Mental Health, and Competency [§ 7.12]

It is important to understand the definitions of capacity, competency, and incompetency, because each of these are distinct items, and to note the abilities versus the legal finding.

Capacity is the ability to understand and appreciate one's actions; the ability is fluid and may be present at some moments while lacking in others. In reviewing capacity, what is relevant is whether an individual is able to understand and appreciate the individual's actions *at that moment*. How "much" capacity is required to execute a legal document differs depending on the type of document. In reviewing the individual's capacity for medical purposes, the criteria cited in the informed-consent regulations apply. Is the individual able to understand the risks and rewards of treatments? Can the individual understand the procedure? Can the individual weigh alternative treatments? Can the individual consent to a procedure?

Competency is a legal finding. Proceedings that evaluate competency are held by the court to determine an individual's capacity. The determination is a judicial matter and not strictly a medical decision to be determined by the expert's report or testimony. *State ex rel. Haskins v. County Ct. of Dodge Cnty.*, 62 Wis. 2d 250, N.W.2d 575 (1974). Lacking "substantial mental capacity" does not assuredly indicate the presence of a mental disease or defect. *Id.* Further, not all individuals suffering from mental illness are incompetent; there is no need to identify a mental illness to rule that an individual is incompetent. *State v. Byrge*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477.

Incompetency is the lack of ability to understand and appreciate one's actions in regard to either (or both) health care and finance. Hence, guardianship of the person and guardianship of the estate (also known as financial guardianship) are distinct evaluations. A court must declare the individual's competency and need for a guardian. Said otherwise, the individual must be adjudicated as an incompetent person.

The Wisconsin statutes discuss competency largely in the context of criminal proceedings. *See* Wis. Stat. ch. 971. Competency is not specifically addressed in the civil statutes, though it appears to be hovering just overhead in the guardianship provisions of Wis. Stat. ch. 54. The interrelation of mental health and illness, competency, and consent are found within multiple chapters of the statutes, including the following:

Wis. Stat. ch. 51	State alcohol, drug abuse, developmental disabilities and mental health act (commitments, detentions, and treatment)
Wis. Stat. ch. 54	Guardianships and conservatorships
Wis. Stat. ch. 55	Protective service system
Wis. Stat. ch. 58	Private asylums, hospitals and societies
Wis. Stat. ch. 165	Department of justice (review of Wis. Stat. ch. 51 commitment proceedings)
Wis. Stat. ch. 808	Appeals and writs of error (court actions pending appeal)
Wis. Stat. ch. 813	Injunctions, ne exeat and receivers (restraining orders and injunctions)
Wis. Stat. ch. 971	Criminal procedure—proceedings before and at trial (competency to stand trial)

The Wisconsin Supreme Court has ruled that individuals (in some circumstances) deemed not competent are therefore not able to consent to, or refuse to consent to, administration of treatment. In *State v. Anthony D.B.*, 2000 WI 94, 237 Wis. 2d 1, 614 N.W.2d 435, the court examined whether an individual committed under Wis. Stat. ch. 980, ruled as not competent, could then refuse medication ordered by

the court. Because individuals who are committed under Wis. Stat. ch. 980 (Sexually Violent Person Commitments) are patients as defined by Wis. Stat. § 51.61(1), the court ruled that Wis. Stat. § 51.61(1)(g) authorizes a court to issue an order requiring medication administration regardless of client consent. *Anthony D.B.*, 2000 WI 94, 237 Wis. 2d 1. The court also held that periodic reviews of orders to compel medication sufficiently satisfy due process; the patient's right to review is set forth in Wis. Stat. ch. 51.

An imprisoned individual with diagnosed schizophrenia brought a similar action, demanding the right to exercise informed consent (to refuse treatment) in *Winnebago County v. C.S. (In re Mental Commitment of C.S.)*, 2019 WI App 16, 386 Wis. 2d 612, 927 N.W.2d 576, *rev'd*, 2020 WI 33, 391 Wis. 2d 35, 940 N.W.2d 875. The court of appeals found that the state has an interest in providing care to imprisoned individuals who have mental illnesses and who have been ruled not competent to refuse treatment. *Id.* The Wisconsin Supreme Court disagreed and held that Wis. Stat. § 51.61(1)(g)3. is facially unconstitutional for inmates who are "involuntarily committed under Wis. Stat. § 51.20(1)(ar), which does not require a determination of dangerousness, when the inmate is involuntarily medicated based merely on a determination that the inmate is incompetent to refuse medication. Incompetence to refuse medication alone is not an essential or overriding State interest and cannot justify involuntary medication." *C.S.*, 2020 WI 33, ¶ 5, 391 Wis. 2d 35.

The Wisconsin Supreme Court has also ruled that a county must overcome the individual's "presumption of competence to make an informed choice to refuse medication" when a Wis. Stat. ch. 51 commitment is extended, as well as the entry of an involuntary medication order. *Outagamie Cnty. v. Melanie L. (In re Mental Commitment of Melanie L.)*, 2013 WI 67, 349 Wis. 2d 148, 833 N.W.2d 607. A county, per the ruling, must prove by clear and convincing evidence that the individual at issue is "'substantially incapable of applying' an understanding of the advantages, disadvantages, and alternatives of [his or] her prescribed medication to [his or] her mental illness in order to make an informed choice as to whether to accept or refuse the medication" in light of statements indicating improved functioning. *Id.*¶ 96.

E. Access to Health-Care Records Without Informed Consent—Wis. Stat. § 146.82 [§ 7.13]

Wis. Stat. § 146.82(2) addresses informed consent in relation to the confidentiality of health-care records. (Wis. Stat. ch. 146 and the Health Insurance Portability and Accountability Act (HIPAA) are discussed at greater length in section 7.15, *infra*.) Wis. Stat. § 146.82(2) provides that, while all patient health-care records must remain confidential, there are a number of exceptions that allow records to be released without informed consent, including, but not limited to, records released pursuant to court orders and records released to researchers affiliated with the health-care provider, law enforcement agencies in the course of some investigations (including abuse), departments of corrections when responsible for the patient prisoner, and organ-transplant-team members.

III. Disclosure of Confidential Material Under HIPAA [§ 7.14]

A. Federal Law [§ 7.15]

Most individuals are aware of the existence of HIPAA. Most of the general public is aware of the Standards for Privacy of Individually Identifiable Health Information [hereinafter the Privacy Rule] issued by the U.S. Department of Health and Human Services to implement the requirements of HIPAA. The guiding principle of the Privacy Rule is to limit the circumstances in which a patient's private health information may be disclosed or used. The patient may authorize disclosure in writing, typically in the form of a release signed when the patient presents for treatment.

45 C.F.R. pt. 160 and 45 C.F.R. pt. 164 contain numerous general administrative requirements. Readers interested in finding more in-depth information should review the code, attend continuing legal education presentations, and read the many scholarly articles dissecting the rule. Basic tenets include the following:

- Three entities must follow the Privacy Rule: health plans, health-care clearinghouses, and health-care providers that transmit electronic information.
- The specified entities can only use the information without authorization from the patient in specific circumstances (listed in the regulation) and when not for treatment, payment, or health-care operations and management.
- The patient's or guardian's authorization must be written, use plain language, and specify how the entity expects to use the information, to whom the information may be disclosed, the time period (including expiration) for the authorization, and the right to revoke the authorization.
- The code does not mandate that every risk of incidental disclosure or use be eliminated. An incidental disclosure is permitted if it results from an allowed disclosure, though the entity must have been utilizing the reasonable safeguards noted in the code.
- Disclosure may occur without specific authorization in the furtherance of 12 national priority purposes:
  - Requirements of law (statute, regulation, or court order);

- Public health activities (e.g., local health departments authorized to collect information, compliance with Food and Drug Administration regulations, notification to individuals exposed to communicable diseases, and requesting information from employers about employees injured at work);
- Protection of domestic violence and abuse victims;
- Health oversight activities (audits, investigations, etc.);
- Judicial and administrative activities by order;
- Law enforcement purposes in circumstances including as required by law, to identify and locate people, for law enforcement requests for information about a crime victim or suspected crime victim, to alert law enforcement about a suspected crime-related death, when the information is evidence of a crime committed on the entity's premises, or use by health-care providers in a medical emergency to inform law enforcement about criminal information;
- Identification of a decedent, identification of cause of death, etc.;
- Organ and tissue donation;
- Research;
- Prevention of serious threat to health or safety (discussed more in sections 7.29–.30, *infra*);
- Essential governmental functions (engaging in intelligence and military activities, determining eligibility for governmental programs, maintaining the health of prisoners, etc.); and
- Worker's compensation.

Disclosure of psychotherapy notes is specifically addressed in HIPAA.

Psychotherapy notes are notes that are recorded (in any medium) by a health-care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record. They do not include medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date. 45 C.F.R. § 164.501.

To disclose psychotherapy notes, a covered entity must receive authorization from the patient, except when the covered entity that created the notes (1) needs them for treatment; (2) uses them for training its staff, students, or practitioners; or (3) needs them to defend itself in a legal proceeding brought by the patient. 45 C.F.R § 164.801(a)(2). The rules regarding *compound authorizations*, when more than one authorization for disclosure is used, state that psychotherapy notes can only be combined with another request for psychotherapy. 45 C.F.R. § 164.508(b)(3)(ii).

B. Wisconsin Law [§ 7.16]

Wis. Stat. §§ 146.81–.84 contain additional health provisions that echo HIPAA in the Code of Federal Regulations. Wis. Stat. § 146.82(2) provides a detailed list of circumstances in which patient health-care records may be released without informed consent. Wis. Stat. § 146.82(3) clarifies that reports may be made without informed consent. These statutes are especially useful when researching intersections with other proceedings. Attorneys addressing disclosure issues should consult both federal and state sources to obtain the most information possible for the legal circumstance.

IV. Potentially Applicable Privileges—Wis. Stat. Ch. 905 [§ 7.17]

A. In General [§ 7.18]

Wis. Stat. ch. 905 contains a number of evidence privileges. When discussing mental health and the law, the conversation must mention confidentiality privileges, which are best viewed as specific pieces of secrecy. The exceptions to these privileges are covered in the next section.

B. Doctor-Patient [§ 7.19]

The doctor-patient privilege is more appropriately called the health-care provider-patient privilege. This expanded provider circle is evident even in the title of Wis. Stat. § 905.04(2), which lists the following categories of providers that have a privilege with patients: physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist, podiatrist, and professional counselor. Generally, this privilege enables a patient to prevent disclosure of confidential information among other treating health-care providers, as well as members of the patient's family who may be involved in the treatment. *Confidential information* includes records created for

treatment and diagnosis. The privilege can be claimed by the patient, the patient's guardian, the personal representative of a decedent, or any of the treating health-care providers "but only on behalf of the patient." Wis. Stat. § 905.04(3).

C. Attorney-Client [§ 7.20]

The attorney-client privilege, which gives rise to the attorney's ethical obligation of confidentiality, is viewed as one of the highest duties of the legal profession. It provides that clients have a privilege to refuse to disclose, and to prevent any other person from disclosing, "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client." Wis. Stat. § 905.03(2). Privilege obligations and confidentiality concerns extend to other legal staff as well; as noted in the statute, they are "representatives" of the lawyer who are involved in the rendition of legal services. *Id.* Attorneys and paralegals are governed by codes of ethics that contain confidentiality obligations.

D. Advocate-Victim [§ 7.21]

A victim has a privilege to refuse to disclose confidential communications made or information "obtained or disseminated" between the victim and the victim's advocate, assuming the advocate was acting in that role and per the advocate's duties. Wis. Stat. § 905.045(2). Holders of the privilege include the victim, the victim's guardian, the victim's advocate, or a personal representative of a decedent. *Id*. The confidential nature of these communications applies to counseling, assistance, and support services extended to the victim—it is any communication that is not intended to be disclosed outside the arena of counseling, assistance, and support services, including support groups. Wis. Stat. § 905.045(1). *Victim advocates* are defined as "an[y] individual who is an employee of or a volunteer for an organization the purpose of which is to provide counseling, assistance, or support services free of charge to a victim*." Id.*

In the April 2020 election, Wisconsin voters approved "Marsy's Law," a constitutional amendment that supporters say provides protection to the rights of crime victims. Marsy's Law provides the opportunity for crime victims to attend all court proceedings and the ability to sit in depositions but also removed the guarantee of the right to a fair trial for people accused of crimes. Judge Frank Remington reviewed a challenge to Marsy's Law in a case brought in Dane County. *Wisconsin Just. Initiative, Inc. v. Wisconsin Elections Comm'n*, No. 19-CV-3485 (Wis. Cir. Ct. Dane Cty. Nov. 3, 2020) (available at https://www.wjiinc.org/uploads/6/1/2/9/61290857/53_2020_11_03_circuit_court_decision.pdf). The court ruled that voters were not properly informed that in adopting Marsy's Law, they would be voting to remove an accused person's state constitutional fundamental right. *Id.* The court wrote that the ballot question "did not meet all the constitutional and statutory requirements as to the content and form necessary to adequately inform the public on the purpose of the amendments upon which they were voting." *Id*. The order was then stayed, pending appeal. *Id.*

V. Exceptions [§ 7.22]

A. In General [§ 7.23]

There are exceptions to the rules regarding disclosure of protected health information. These exceptions exist for the benefit, protection, and education of other people.

B. Psychotherapy Notes—45 C.F.R. § 164.501 and Wis. Stat. § 146.816(2) [§ 7.24]

Like other types of protected health information, psychotherapy notes are subject to privilege and authorization generally, but there are notable exceptions related to mental health treatment and to safety concerns. As stated in section 7.15, *supra*, notes may be released to the originating entity for purposes of treatment. Disclosures without authorization also are allowed for the following purposes: need for training, legal defense, medical-examiner-reporting guidelines, agency oversight, and HIPAA compliance. *See* 45 C.F.R. § 164.512. The entity may also release psychotherapy records without authorization for purposes of disclosing

- "[I]nformation about a patient in a good faith effort to prevent or lessen a serious and imminent threat to the health or safety of a person or the public,"or
- "[A]ny threat made by a patient regarding violence in or targeted at a school in a good faith effort to prevent or lessen a serious and imminent threat to the health or safety of a student or school employee or the public."

Wis. Stat. § 146.816(2)(b)4., 5.

C. Proceedings [§ 7.25]

The health-care provider-patient privilege is subject to exceptions. No exception can be claimed in proceedings for commitment, guardianship, protective services, or "control, care, or treatment of a sexually violent person." Wis. Stat. § 905.04(4)(a). In these court proceedings, it is integral to the judicial proceedings that records are reviewed. Consider a guardianship with its required physician report if it were not excepted from privilege. The court would be unable to make a ruling without that information, and the statutes specifically provide that the "mental condition" of patients as supplied to the court by physicians and psychologists is permitted to be disclosed. Wis. Stat. § 905.04(4)(am). The same reasoning for disclosure of protected information applies in petitions for protective placement and protective services, as well as commitment of sexually violent individuals under Wis. Stat. ch. 980.

D. Waiver [§ 7.26]

An individual may waive a privilege by voluntarily disclosing the information. This waiver is codified in the Wisconsin Statutes pertaining to evidence and pertains to the waiver of attorney-client privilege communications. *See* Wis. Stat. § 905.11. Privilege is waived when a privilege holder "voluntarily discloses or consents to disclosure of any significant part of the matter or communication." *Id.* Waiver of privilege was further discussed in *State v. Schmidt*, 2016 WI App 45, 370 Wis. 2d 139, 884 N.W.2d 510.

Waiver of privilege is distinct from forfeiture of privilege. A disclosure may be deemed inadvertent and thus not a forfeiture if

1. It was inadvertent,
2. The privilege holder took reasonable steps to prevent the disclosure, and
3. The privilege holder took reasonable steps to correct the error.

See Wis. Stat. § 905.03(5).

If, however, the disclosure was purposeful, it may be deemed a forfeiture.

E. Reporting and Disclosure Laws [§ 7.27]

1. Duty to Warn [§ 7.28]

a. *Tarasoff* [§ 7.29]

The "duty to warn" was established in a landmark case in 1976. *See Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976), *superseded in part by statute as stated in Regents of Univ. of Cal. v. Superior Ct.*, 240 Cal. Rptr. 3d 675 (Ct. App. 2018). Well known to both lawyers and health-care professionals, the case involved a psychotherapy patient who told his psychotherapist that he intended to kill a woman who was easily identifiable; he then did kill the woman. The deceased woman's parents brought suit for the psychotherapist's failure to warn the woman about the threat.

The case was ultimately resolved by the California Supreme Court, which ruled that therapists have a duty to warn when they reasonably believe the patient "poses a serious danger of violence to others." *Tarasoff*, 551 P.2d at 345. The treater "bears a duty to exercise reasonable care to protect the foreseeable victim of that danger." *Id.* Notable points in the holding are that the therapist or treatment provider must evaluate whether the risk is serious or predictable, and that the intended victim must be readily identifiable. The duty-to-warn rule has been adopted in most states, either through codification or case law.

Tarasoff has been debated in legal and health professional circles since the original ruling. Treatment providers have voiced their dismay about the obligation to evaluate the seriousness of a threat, questioning how they should evaluate seriousness. There is considerable discussion regarding the exception to confidentiality and the corresponding belief that the duty to warn may result in an erosion of the patient-therapist relationship. Despite these concerns, courts have continued to hear cases in which they must determine whether and when therapists and other health-care providers exert special control over their patients' behavior and whether the weight assigned to the provider-patient relationship creates a provider duty. *See, e.g.*, *Schuster v. Altenberg*, 144 Wis. 2d 223, 424 N.W.2d 159 (1988); *Fraser v. United States*, 674 A.2d 811 (Conn. 1996); *Petersen v. State*, 671 P.2d 230 (Wash. 1983), *superseded by statute on other grounds as stated in Magney v. Pham*, 466 P.3d 1077 (Wash. 2020).

b. *Tarasoff* in Wisconsin [§ 7.30]

Like many states, Wisconsin courts have adopted the "duty to warn," and (again, like many states) added some questionable expansions.

- *Schuster v. Altenberg*, 144 Wis. 2d 223, 424 N.W.2d 159 (1988).

In this case, a psychiatrist was sued by the spouse and a daughter of a patient who was killed in an automobile accident, on the basis that he was negligent in his care and treatment of the patient and that the negligence was a contributing factor in the automobile accident that caused the death of the patient and the paralysis of the patient's daughter, a passenger in the car. The court reviewed whether the psychiatrist could be held liable to third parties under the duty-to-warn concept, weighing considerations of public policy, and held that:

> [T]here most assuredly exist meritorious public policy concerns regarding the imposition of liability upon psychotherapists for harm resulting from the dangerous acts of their patients. These arguments, including confidentiality, unpredictability of dangerousness of patients, concerns that patients are assured the least restrictive treatment and that imposition of liability will discourage physicians from treating dangerous patients, present significant issues of public policy. However, neither the possible impact that limited intrusions upon confidentiality might have upon psychotherapist-patient relations, nor the potential impact that the imposition of liability may have upon the medical community with respect to treatment decisions, warrants the certain preclusion of recovery in all cases by patients and by the victims of dangerous patients whose harm has resulted directly from the negligence of a psychotherapist.

Id. at 261–62. The court concluded that the patient's spouse did have a "legally cognizable claim" and remanded, despite the lack of a foreseeable victim. *Id.* at 262–63.

- *State v. Agacki*, 226 Wis. 2d 349, 595 N.W.2d 31 (Ct. App. 1999).

In this case, the defendant, Agacki, informed his therapist that he was armed and would kill witnesses to a fight. The therapist informed police, who arrested Agacki. The defendant claimed that his statements to his therapist were privileged. The court of appeals held that the communications could be disclosed as an exception to the privilege because the therapist had "reasonable cause to believe his patient was dangerous" and had to act to protect the public. *Agacki*, 226 Wis. 2d at 363.

The holding in *Agacki* expands the *Tarasoff* duty to warn, which was for a specific individual (or two individuals). In *Agacki*, the defendant had made threatening statements regarding specific witnesses to a crime he had committed, but the threat at the time of arrest was posed to a separate group of individuals. Despite the concerns about expansion, the duty to warn is evident in the Wisconsin Statutes and includes additional and specific mention of the duty's application to threats made of violence "in or targeted at a school." Wis. Stat. § 146.816(2)(b)5.

Caution. In Wisconsin, the duty to warn in order to protect is distinct from the duty to report suspected abuse or neglect. That duty to report is discussed in section 7.33, *infra.*

2. Wis. Admin. Code Ch. Psy 5 [§ 7.31]

Psychologists engage in unprofessional conduct when they reveal facts, data, information, records, or communication received from a client in a professional capacity except in the following circumstances:

(a) With the informed consent of the client or the client's authorized representative.
(b) With prior notification to the client at the time the information was elicited of the use and distribution of the information.
(c) If necessary to prevent injury to the client or another person.
(d) Pursuant to the lawful order of a court of law.
(e) Use of case history material for teaching or research purpose, or in textbooks or other literature, provided that proper precautions are taken to conceal the identity of the client.
(f) Where otherwise permitted or required under ss. 51.30 and 146.82, Stats.
(g) When required by federal or state law.

Wis. Admin. Code § Psy 5.01(12).

Thus, the Psychology Examining Board has integrated the requirements set forth in various statutory provisions but added some detail regarding use within textbooks as long as the client's identity can be kept confidential. The duty to warn is codified at Wis. Adm. Code § Psy 5.01(12)(c).

VI. Dual Relationships and Blurred Boundaries [§ 7.32]

The administrative code defines a *dual relationship* as "a situation in which a psychologist provides professional services to a person with whom the psychologist has another relationship such as, but not limited to, relatives, close friends, employees or employers, students or other supervisees." Wis. Admin. Code § Psy 1.02(5m). The code defines, and therefore distinguishes, a prohibited dual relationship as "a dual relationship which may impair objectivity or effectiveness, or permit exploitation, or create an actual, apparent or potential conflict of interest." Wis. Admin. Code § Psy 1.02(9).

As noted in section 7.5, *supra*, certain dual relationships are considered unprofessional conduct that is prohibited by Wis. Admin. Code § Psy 5.01. However, the rule clarifies that the prohibited dual relationships are those reasonably likely to impair objectivity while providing services. This recognizes that there are natural dual relationships that do not impair objectivity and would be difficult to avoid, particularly in rural areas. As such, Wis. Admin. Code § Psy 5.01(17) now provides that it is misconduct for a psychologist to engage in a prohibited dual relationship "or any relationship which is reasonably likely to impair the licensee's objectivity in providing professional services." Wis. Admin. Code § Psy 5.01(30)(c) applies to psychologists who work both for a public agency and in private practice and states that they should not fail to "avoid any prohibited dual relationship or any relationship which is reasonably likely to impair the licensee's objectivity in providing professional services."

The penalty for violating the prohibition is steep. In *Bar-Av v. Psychology Examining Board*, 2007 WI App 21, 299 Wis. 2d 387, 728 N.W.2d 722, the court upheld the board's administrative ruling revoking the Wisconsin psychology license of a treatment provider for his professional misconduct stemming from an alleged sexual relationship with a woman who was a previous client, having attended marriage therapy with her spouse. The treatment provider was found to have violated multiple provisions of the code, including Wis. Admin. Code § Psy 5.01(2) (gross negligence), and "failing to avoid dual relationships that could impair his objectivity or create a conflict of interest," in violation of Wis. Admin. Code § Psy 5.01(17). *Bar-Av*, 2007 WI App 21, ¶ 3, 299 Wis. 2d 387. Many of the facts reviewed by the court pertained to conduct that occurred after therapy, and the court ruled that Wis. Admin. Code § Psy 5.01(17) does apply "when that conduct creates a financial, legal, and psychological conflict of interest with a former client." *Bar-Av*, 2007 WI App 21, ¶ 29, 299 Wis. 2d 387. Accordingly, when dual relationships may exist, the facts and timeline of the relevant conduct will be examined for multiple conflicts of interest.

VII. Child Abuse or Neglect [§ 7.33]

A. What and Who [§ 7.34]

Statutory definitions of abuse and neglect appear in the Children's Code at Wis. Stat. ch. 48. Abuse includes, but is not limited to, physical injury, sexual contact (under Wis. Stat. chs. 940 and 948), living in a home where methamphetamine is manufactured, and emotional damage. Wis. Stat. § 48.02(1). The laws list mandatory reporters: individuals who must (a "shall" provision) report suspected abuse or neglect of a child. Wis. Stat. § 48.981(2)(a)–(bm). The reporting obligation extends to children who are believed to have been threatened with abuse or neglect or to whom abuse or neglect "will occur." *Id.* Reporters include professional workers, court-appointed advocates, attorneys, and members of the clergy. The mandatory-reporter list contains all of the following:

- Physicians
- Coroners
- Medical examiners
- Nurses
- Dentists
- Chiropractors
- Optometrists
- Acupuncturists
- Social workers
- Marriage and family therapists
- Professional counselors
- Public assistance workers, including financial and employment planners
- Teachers
- School administrators
- School counselors

- Mediators
- Child-care workers in a child-care center, group home, or residential care center for children and youth
- Child-care providers
- Alcohol or other drug abuse counselors
- Members of the treatment staff employed by or working under contract with a county department, or a residential care center for children and youth
- Physical therapists
- Physical therapist assistants
- Occupational therapists
- Dietitians
- Speech-language pathologists
- Audiologists
- Emergency medical services practitioners
- Emergency medical responders
- Police or law enforcement officers
- Juvenile correctional officers
- Court-appointed special advocates
- Attorneys
- Members of the clergy (exceptions are made for confessional communications)

The statute provides protections for reporters, stating that these individuals may not be discharged or retaliated against for complying with their reporting obligation. Wis. Stat. § 48.981(2)(e).

Two groups are permitted some exception to mandatory reporting: persons with delegated parental powers and providers of confidential health-care services. Wis. Stat. § 48.981(2m), (2r).

1. *Persons delegated parental powers:* Wis. Stat. *§ 48.981(2r).*
   This group of persons has been delegated care and custody of a child under § 48.979. This section does not pertain to children placed into foster care, despite language that may appear to indicate that. These persons may still report abuse or neglect, but they are not required to do so.

2. *Health-care-service providers:* Wis. Stat. *§ 48.981(2m).*
   The purpose of providing an exception to reporting mandates is to allow children to obtain health-care services confidentially. Providers are not mandated to report all sexual intercourse, sexual contact, or threatened abuse. Reports are required for
   - Sexual contact or intercourse with a caregiver;
   - Sexual contact or intercourse by a child unable to understand to such actions because of mental illness, mental insufficiency, age, or immaturity;
   - Sexual contact or intercourse when the child was unconscious or otherwise unable to consent; and
   - Sexual contact or intercourse that is exploitation of the child.

B. How and Where [§ 7.35]

The Wisconsin Department of Public Instruction (DPI), in partnership with the Wisconsin Department of Children and Families (DCF), provides clear instruction on mandated reporting, instructing educators as follows: "To report a case of child abuse or neglect, contact the county or tribe where the child or child's family lives. If the agency is not known, contact the closest county or call 9-1-1. Contact information for county and tribal child welfare agencies is available at dcf.wisconsin.gov." Wis. DPI & Wis. DCF, *Mandated Reporting: Information for School Staff During 'Safer at Home'*, https://dcf.wisconsin.gov/files/press/2020/cw-covid-edu.pdf (last visited Apr. 13, 2021). After the report is made, law enforcement (or county or tribal officials, depending on location) responds within 12 hours.

Reporters and investigation are designated by Wis. Stat. § 48.981(3). A mandated reporter must "immediately" inform the relevant county department or child welfare agency by phone or in person. Wis. Stat. § 48.981(3)(a)1. Though a contentious point, the court of appeals has ruled that a reporter may take "reasonable" time to verify a child's allegation before reporting it to the authorities. *Phillips v. Behnke*, 192 Wis. 2d 552, 531 N.W.2d 619 (Ct. App. 1995). In that case, the allegation involved a teacher accused of improper sexual conduct. The court found that the nature of an allegation of sexual impropriety by a teacher is "extremely damaging both to the individual's

reputation and career. Accordingly, investigating the reasonableness of one's belief that a teacher has engaged in sexual misconduct does not deprive the individual of immunity" under Wis. Stat. § 48.981(2)(e), nor is it inconsistent with the statute's requirement that such information be reported immediately. *Phillips*, 192 Wis. 2d at 562.

People in mandated reporter positions, especially those who are new to reporting mandates and later investigations, may confuse their obligations, good intentions notwithstanding.

Example. A school principal suspects a student was being abused by a family member or members and reports that belief to the relevant county agency. A police officer is assigned to investigate the suspected abuse by the agency and sets out to do so within a few hours. In speaking with the family, the officer improperly relays to them that an individual at the school has made the report of abuse. Although doing so might not be illegal, the action compromises the investigation of the alleged abuse, the child's ability to continue the child's education in the school system without significant risk to their education, and their well-being at home.

VIII. Professionals and Testifying [§ 7.36]

A. Federal Law—HIPAA and the Privacy Rule [§ 7.37]

The HIPAA Privacy Rule is more officially titled the Standards for Privacy of Individually Identifiable Health Information. As discussed earlier, *see supra* § 7.15, the Privacy Rule prohibits the use and disclosure of protected health information without patient authorization and permits or requires the use and disclosure in specified circumstances. 45 C.F.R. § 164.502. Although a patient may authorize a health-care professional to reveal protected information in court proceedings, the Privacy Rule does not require the professional to testify. If testimony is not willingly provided in a court proceeding, it may be required by a properly issued subpoena.

Practice Tip. Be wary of situations involving personal representatives. Although 45 C.F.R. § 164.502(g) treats a personal representative "as the individual," state laws may still prohibit release of protected health information, despite authorization by a personal representative. Additionally, in some circumstances, the professional may deny release based on the exercise of professional judgment. Moreover,

> Where the parent, guardian, or other person acting in loco parentis, is not the personal representative under paragraphs (g)(3)(i)(A), (B), or (C) of this section and where there is no applicable access provision under State or other law, including case law, a covered entity may provide or deny access under § 164.524 to a parent, guardian, or other person acting in loco parentis, if such action is consistent with State or other applicable law, provided that such decision must be made by a licensed health care professional, in the exercise of professional judgment.

45 C.F.R. § 164.502(g)(3)(ii)(C).

B. Evidentiary Privilege—Wis. Stat. § 905.04 [§ 7.38]

Wisconsin's evidence rules are set forth in Wis. Stat. ch. 905 and include the doctor-patient privilege (or health-care provider-patient privilege). As discussed previously, the privilege affords patients confidentiality for information pertaining to their treatment or diagnostic actions. Wis. Stat. § 905.04. The privilege can be claimed by the patient, the patient's guardian, or the personal representative of a deceased patient. Wis. Stat. § 905.04(3). The health-care professional may also claim the privilege "but only on behalf of the patient." *Id.* The evidentiary privilege is subject to exceptions, including abuse claims, neglect claims, homicide trials, judge-ordered examination, and guardianship, commitment, and protective placement proceedings. Wis. Stat. § 905.04(4).

Note. The health-care provider-patient privilege does not apply in proceedings for worker's compensation claims. Wis. Stat. § 102.13(1)(d), (2). The statutes explicitly state that an "employee who reports an injury alleged to be work-related or files an application for hearing waives any physician-patient psychologist-patient, or chiropractor-patient privilege with respect to any condition or complaint reasonably related to the condition for which the employee claims compensation." Wis. Stat. § 102.13(2)(a). There are exceptions for any applicable state law that may exist to the contrary and for provisions regarding health-care records. *See* Wis. Stat. §§ 51.30, 146.82.

C. The *Alt* Privilege [§ 7.39]

Health-care professionals may be called to testify and can be compelled to provide factual evidence; however, they may assert the "*Alt* privilege" if called to provide "expert" testimony. In *Burnett v. Alt (In re Imposition of Sanctions in Alt v. Cline)*, 224 Wis. 2d 72, 589 N.W.2d 21 (1999), the Wisconsin Supreme Court explained that while factual testimony from a witness can be required, expert testimony

cannot be required without "compelling circumstances." Consequently, the court "conclude[d] that a witness's privilege to refuse to provide expert testimony is inherent in Wis. Stat. § 907.06." *Id.* at 86. The court wrote:

> The appropriate scope of expert privilege requires a balance between the right of expert witnesses to be free from testifying against their will and the needs of the court and litigants for testimony. A person who has expended resources to attain specialized knowledge should not be forced to part with that knowledge upon demand, absent compelling circumstances. We do not force lawyers to provide services to anyone who walks in the door. We do not force other professionals to provide their services absent compelling circumstances. We see no reason to treat experts in a court of law any differently.

Id. at 88.

In a later case, the court qualified *Alt*, ruling that "compelling circumstances" include the demanding parties' showing that a witness is unique. *Glenn v. Plante*, 2004 WI 24, 269 Wis. 2d 575, 676 N.W.2d 413 (holding that expert testimony would not pertain to the care provided by that expert but the treatment and standard of care provided by another (physician) expert). "Where there is a correct application of *Alt*, the determination as to whether compelling circumstances exist involves a discretionary decision by the circuit court judge. The compelling circumstances determination should focus on whether there is unique or irreplaceable opinion testimony sought from an expert, not on the procedural aspects of the case*." Id.* ¶¶ 34–35.

The expert witness privilege addressed in both *Alt* and *Glenn* has received further examination and qualification in medical-malpractice matters. *Carney-Hayes v. Northwest Wis. Home Care*, 2005 WI 118, 284 Wis. 2d 56, 699 N.W.2d 524. In *Carney-Hayes*, the court held that medical witnesses "must" testify regarding their own thought processes, observations, treatment, actions, training, and education, and "what institutional rules she believed applied to her conduct." *Id.* ¶ 5. It continued:

> Subject to the compelling need exception recognized in *Alt* and *Glenn*, a medical witness who is unwilling to testify as an expert cannot be forced to give her opinion of the standard of care applicable to another person or her opinion of the treatment provided by another person. Unless a medical witness who is unwilling to testify as an expert is alleged to have *caused* injury to the plaintiff by her medical negligence, the witness is not required to give her opinion on the standard of care governing her own conduct.

Id. (emphasis added)

However, when the health provider witness may have caused the injury through their own alleged medical malpractice, the witness may be required to provide their "opinion on the standard of care governing her own conduct." *Id.* As expected, experts so required may be defendants in the medical malpractice action.

D. Attorney for the Testifying Professional [§ 7.40]

Individual health-care providers called to testify are not required to retain an attorney. Many larger health-care organizations have their own legal departments, and employees may be required or encouraged to alert the employer's counsel or risk-management entities. If the employer has not arranged for legal counsel, the provider's malpractice insurance may supply counsel. For providers in smaller or individual practices, as well as those whose malpractice coverage does not supply counsel for subpoenas, attorney consultation is recommended. Although it might not be necessary for the health-care provider to retain an attorney, it is worthwhile for a provider to confirm privileged information in light of relevant Wisconsin case law and statutes.

E. In Person Versus By Writing [§ 7.41]

Subpoenas for expert witness testimony state that testimony should be given in person. Under the U.S. Constitution, defendants have the right to "be confronted with the witnesses against [them]." U.S. Const., amend. VI. The Wisconsin Constitution contains a parallel right, stating that the accused has the right "to meet the witnesses face to face." Wis. Const. art. I, § 7. However, in-person expert-witness testimony raises practical concerns for witnesses, such as missed work, missed pay, and stress.

Exceptions to the requirement are few and pertain to written records. In Wisconsin, if agreed upon by the parties, and if service requirements are met, the records and statements of health-care providers may be admitted in lieu of testimony. These agreements are common in both criminal and civil trials because they reduce costs and save time. Wis. Stat. §§ 908.03(4), (6m), 909.02(11).

IX. Conclusion [§ 7.42]

The legal duties of mental health professionals are rarely clear-cut and remain subject to interpretation. Relevant laws, administrative code, and case law are illustrative of the push and pull of the relationship between the legal and medical fields. Further, both the legal and the medical fields continue to change and adapt in accordance with client and patient needs, progression of technology and research, and social-cultural attitudes. Professionals in both fields must continually review their thoughts and actions with an ethical lens and be aware of the moments that inspire better care and service.

Chapter 8
Discrimination Against People with Mental Illness and Intellectual Disabilities

Monica Murphy

I. Scope of Chapter [§ 8.1]

The history of discrimination against people with mental illnesses and intellectual disabilities is long and sordid. For many years, such individuals were warehoused and isolated under sometimes atrocious and punitive conditions. It is only in the last half century that the disability rights movement and the deinstitutionalization reform it engendered brought people with these disabilities into active participation in community life, including employment, housing, and social engagement. Still, much stigma, misunderstanding, and stereotyping remain. This chapter discusses the civil rights protections afforded people with mental illnesses and intellectual disabilities in the areas of employment, community life, housing, and education. [7]

II. Employment Protections [§ 8.2]

A. The Americans with Disabilities Act [§ 8.3]

1. In General [§ 8.4]

Congress passed the Americans with Disabilities Act (ADA) in 1990 with broad goals of remedying a long history of discrimination, segregation, and paternalism experienced by people with disabilities. *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101–12213). Modeled after the Rehabilitation Act of 1973, which only applied to programs receiving federal funds, the ADA sought to address a broad sweep of public life. The ADA has three main titles. Title I covers employment. Title II covers state and local governmental entities and public transportation. Title III covers places of public accommodations, such as stores, restaurants, hotels, social service agencies, medical facilities, and law offices. Each of these titles is covered in turn below. Additional titles cover telecommunications and the ADA's relationship to other laws.

2. Title I of the ADA [§ 8.5]

a. Coverage and Definitions [§ 8.6]

The ADA applies to all employers who have 15 or more employees. 42 U.S.C. § 12111(5). The ADA defines disability to include people with disabilities, people who have a history of having a disability, or people who are perceived as having a disability.

The term *disability* means, with respect to an individual

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
(B) a record of such an impairment; or
(C) being regarded as having such an impairment ….

42 U.S.C. § 12102(1).

In turn, an *impairment* is defined as follows:

(h) Physical or mental impairment means:

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or
(2) Any mental or psychological disorder, such as an intellectual disability …, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h).

Major life activities are defined as follows:

(2) Major Life Activities

(A) In general
For purposes of [42 U.S.C. § 12102(1)], major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions
For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

42 U.S.C. § 12102(2).

Neither of the above lists of impairments or major life activities is meant to be exhaustive, and it is possible other conditions may meet the definition of disability under the ADA.

Congress passed the ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 [hereinafter ADAA], in response to several U.S. Supreme Court decisions that had narrowed the definition of disability and resulted in extended litigation on the question of disability. Under the ADAA, Congress made clear that the definition of disability was to be broadly interpreted, and the use of mitigating measures (with the exception of eyeglasses and contact lenses), such as medications or therapy, were not to be considered when determining whether an impairment substantially limited a major life activity. Additionally, the ADAA made clear that the impairments that are episodic, including many mental illnesses, would be considered disabilities if substantially limiting when active.

As mentioned above, the ADA protections apply to individuals who have a record or history of a disability, or individuals who are regarded as or perceived as disabled by others even if they are not currently limited in any major life activity. Thus, someone who has in the past been treated for a significant mental illness would be protected against discrimination on that basis. Likewise, someone whose behavior or appearance causes others to regard them as being mentally ill and who are treated in a discriminatory manner because of it would also be protected.

b. Qualified Individual with a Disability [§ 8.7]

Under the employment provisions of the ADA, protection against discrimination and the provision of reasonable accommodations apply to people who are considered to be "qualified individuals with a disability."

The term "qualified," with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position.

29 C.F.R. § 1630.2(m).

The ADA is not an affirmative action statute, and nothing in the law requires an employer to hire a person with a disability over someone who is not disabled. However, an employer cannot reject a qualified individual merely because the person has a disability.

The ADA subdivides job duties into essential and marginal functions. To be a qualified individual, a person must be able to perform essential functions with or without reasonable accommodation; however, a person need not be able to perform marginal functions to be

considered a qualified individual.

Essential functions may be determined by many factors. The most basic of these is the reason the job exists. If the job exists to perform a certain function, that function is likely essential. Other factors to consider include the following: if there are only a limited number of employees available to perform this function, whether the function is highly specialized and the person in the position is hired for special expertise or their ability to perform it, the amount of time spent performing the function, whether the function is identified in a written job description or a collective bargaining agreement, and the work experience of people who have performed the job in the past or who are currently performing a similar job. Most important, are employees in the position actually required to perform the function?

Marginal functions, on the other hand, are those that are only incidental to the position and could easily be performed by another employee. Marginal functions are generally those that take a limited amount of time or are seldom or rarely performed.

Practice Tip. The ADA contains many terms that are unique or have special meaning. An excellent resource for understanding the meaning of terms under the ADA is at ADA National Network, *Glossary of ADA Terms*, https://adata.org/glossary-terms (last updated May 2021).

c. Prohibited Discrimination [§ 8.8]

(1) In General [§ 8.9]

The ADA's prohibitions against disability discrimination apply at all stages of the employment relationship from recruitment to termination. Permissible inquiries related to disability vary somewhat in these different stages.

(2) Recruitment and Preemployment [§ 8.10]

Employers cannot discriminate on the basis of disability in recruitment and hiring practices. An employer is required to provide reasonable accommodations to applicants and interviewees if necessary. Employers are limited as to what they can and cannot ask about a person's limitations or abilities at the pre-offer stage.

Interviews

Cannot ask:
- Disability-related questions
- Questions likely to elicit disability-related information
- About worker's compensation history
- About attendance in previous job
- Whether they need reasonable accommodations to perform the job
- About medical history
- About use of prescription drugs
- That applicants undergo medical examinations

Can ask:
- Whether applicant can perform the job
- Whether applicant can meet employer's attendance requirements
- Applicant to describe or demonstrate how they would perform the job (with or without reasonable accommodations)
- Whether applicant needs reasonable accommodations for hiring process

Testing

If a test screens out or tends to screen out people with disabilities on the basis of disability, it must be job related and consistent with business necessity. An employer may be obligated to provide reasonable accommodations to the test taker.

Psychological tests such as personality-type tests are permissible at this stage, but tests that lead to identifying whether the individual has conditions listed in the *Diagnostic and Statistical Manual of Mental Disorders (DSM 5)* (Am. Psych. Ass'n 5th ed. 2013) would be considered medical and are not permissible at this stage.

Testing to determine current illegal use of controlled substances is not considered a medical exam and can be given at any stage.

(3) After Offer [§ 8.11]

Once an employer has made a job offer, the offer can be made conditional on a medical exam if all entering employees in the same job category are subject to the same exam without regard to disability. The information gleaned from the exam must be kept confidential.

Can ask:

- About individual's worker's compensation history, illnesses, diseases, impairments, and general physical and mental health
- Questions even if not related to the job
- Applicant to undergo medical exam even if not related to the job

(4) Terms and Conditions [§ 8.12]

Employers cannot discriminate against people with disabilities by subjecting them to different terms and conditions of employment than employees without disabilities. People with disabilities cannot be paid less because they have a disability or because an employer believes an employee with a disability will be an added expense. For example, an employer who provides employer-paid health insurance to employees cannot refuse to provide the benefit to an employee with a disability in the belief that it will raise its premiums. An employer could not have policies that would prevent people with disabilities from being promoted or being denied raises because of their disability.

(5) Discharge [§ 8.13]

Employers cannot discriminate against employees with disabilities in discharge or termination or apply different disciplinary policies to them. An employer cannot discharge an employee who becomes disabled while in the employer's employ unless that individual is no longer able to perform the essential functions of the job with or without reasonable accommodations.

d. Protection from Harassment [§ 8.14]

Just as an employer has an obligation to protect employees from sexual harassment on the job, employers also have an obligation to protect employees from harassment based on their disabilities. People with mental illnesses and people with intellectual disabilities seem to be particularly prone to this type of harassment, perhaps because of the continuing stigma, stereotyping, and ignorance surrounding these disabilities.

People with mental illness or intellectual disabilities often face very offensive mocking or name calling. They can also face coercion from coworkers and supervisors pushing them to do things they are not supposed to do, being the subject of jokes or pranks, or forcing them to pay for things on the behalf of coworkers.

However, to be actionable, a hostile work environment must meet the same standards as required of Title VII hostile work environment cases.

The plaintiff bears the burden of demonstrating that (1) the work environment was both objectively and subjectively offensive, (2) the harassment was based on membership in a protected class or in retaliation for protected behavior, (3) the conduct was severe or pervasive, and (4) there is a basis for employer liability. *Robinson v. Colvin*, No. 13 C 2006, 2016 WL 1161272, at *4 (N.D. Ill. Mar. 24, 2016) (unpublished). In determining whether a plaintiff has met these various elements, courts must consider all the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it was physically threatening or humiliating; or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Silk v. City of Chi.*, 194 F.3d 788, 804 (7th Cir. 1999) (citation omitted).

e. Disclosure of Disability and Confidentiality Concerns [§ 8.15]

Not surprisingly, given the stigma that attaches to mental illnesses, people with mental illnesses are often reluctant to disclose their disability to their employers. An employee is under no obligation to disclose a disability to an employer at any stage of the employment

relationship unless the employee is requesting a reasonable accommodation, *see infra* §§ 8.16–.21, for that disability. However, an employer is not obligated to accommodate a disability that the employer is not aware of.

In the case of an episodic disability, which most disabilities caused by mental illnesses are, an employee can get caught up in a situation in which the employee's mental illness flares up and the employee's work suffers, but the employer is not aware of the disability or the need for the accommodation. The decision to disclose a mental illness is a purely personal one, but it is important for employees to recognize that they may need to disclose to invoke disability-related protections.

Employers are obligated to keep disability-related information confidential and such information is to be kept separate from the employee's personnel file. In the case of a reasonable accommodation, information about the accommodation should be shared only on a need-to-know basis, usually with the employee's supervisor and perhaps human resources staff who are reviewing and setting up the accommodation.

Employees are free to disclose their disabilities if they so choose. Occasionally, they may even ask for sensitivity training for coworkers so their coworkers may better understand the disability. This, too, is a purely personal decision, and employers need to be careful not to spotlight a person with a disability, no matter their intentions in doing so.

f. Reasonable Accommodation [§ 8.16]

(1) In General [§ 8.17]

Unlike most other laws addressing workplace discrimination that primarily address which behavior is prohibited, the cornerstone of the ADA is the affirmative duty on the part of an employer to provide a reasonable accommodation. The duty to provide a reasonable accommodation includes not only allowing the employee equal opportunity to do the employee's job but also allowing employees with disabilities to enjoy the benefits and privileges of employment, including such things as training, social functions, and other services available to employees (employee assistance programs, cafeteria, gyms, etc.).

According to the ADA, reasonable accommodations may include:

> (A) [M]aking existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
> (B) [J]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9).

There is no specific procedure for how an employee is to request a reasonable accommodation, although some employers may have set up their own protocols. An employee need not even use the term "reasonable accommodation" when making a request. Requests need not be in writing. The employee simply identifies a need or concern that the employee has related to performing the employee's job due to the disability. If an employer is aware of an individual's disability and the employee is having difficulty performing his job, the employer may inquire whether the employee is in need of a reasonable accommodation. Additionally, requests for accommodation may come from a third party such as a family member or medical professional.

Practice Tip. To make the request for accommodation and the employer's response clear, it is recommended that the employee make the request in writing and set a date for a reasonable time for the employer to respond to the request. If the limitations caused by the disability are not well known, the employee may want to include information about the disability and possible accommodations along with that request.

The ADA does require the parties to engage in a process to determine the need for an accommodation and what might be a reasonable accommodation, if the needed accommodation is not obvious. This is called the interactive process. 29 C.F.R. § 1630.2(o)(3). The purpose of the interactive process is to determine what accommodation is appropriate to the situation by determining the precise limitations imposed by the disability and exploring potential accommodations to overcome those limitations.

Engaging in the interactive process is required of both parties, and failure to engage in good faith may result in a finding of discrimination, as occurred in *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281 (7th Cir. 1996). In this case, a janitor with serious mental illness was offered transfer to a new position upon return from extended leave. The employer told him that he would need to undergo a medical examination and he would not be granted special accommodations as he had at other schools where he had worked.

Bultemeyer toured the school but told the employee relations director that he could not work at that school and he was afraid that if he underwent a medical examination, he would have to work at that school. He did not undergo a medical examination and he did not appear for work at the new school. He was terminated shortly thereafter. The court found that the employer did not properly engage in the interactive process. To properly engage in the interactive process, the employer needed to have an understanding of Bultemeyer's mental illness and should have connected with Bultemeyer's psychiatrist about what Bultemeyer found stressful about the school in question. *Id.* at 1284. The court stated, "In a case involving an employee with mental illness, the communication becomes more difficult. It is crucial that the employer be aware of the difficulties, and help the other party determine what specific accommodations are necessary." *Id.* at 1285.

Alternatively, an employee who failed to act in good faith in the interactive process can be denied a finding of discrimination based on the failure to reasonably accommodate. In *Beck v. University of Wisconsin Board of Regents*, 75 F.3d 1130 (7th Cir. 1996), the employer was not held liable for a failure to provide a reasonable accommodation. The employee would not sign a release to allow the employer to get more information from the employee's physician, and the physician had provided only vague guidance as to the need for reasonable accommodation. The employer made several attempts to provide what it thought were appropriate accommodations. The court determined that courts should make the determination on a case-by-case basis.

> No hard and fast rule will suffice, because neither party should be able to cause a breakdown in the process for the purpose of either avoiding or inflicting liability. Rather, courts should look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary. A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith. In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility.

Id. at 1135.

Failure to engage in the interactive process is not in and of itself an independent basis for liability; it is actionable "if it prevents identification of an appropriate accommodation for a qualified individual." *Basden v. Professional Transp., Inc.*, 714 F.3d 1034, 1039 (7th Cir. 2013).

(2) Reasonable Accommodation Inquiries [§ 8.18]

When the disability or the need for accommodation is not obvious, the employer may ask the employee for reasonable documentation about the disability and the functional limitations caused by it. An employer is only obligated to accommodate a *known* disability. If the employer was not already aware that the individual has a covered disability, the employer can ask for documentation of the disability. The employer can require that the information about the employee's disability and functional limitations come from an appropriate health-care provider or rehabilitation professional. This may include, but is not limited to, physicians (including psychiatrists), psychologists, nurses, physical therapists, occupational therapists, speech therapists, vocational rehabilitation specialists, and licensed mental health professionals.

An employer cannot ask for documentation that is unrelated to determining the existence of a disability and the necessity for an accommodation. Usually this means an employer cannot ask for a person's complete medical records. If an employee has more than one disability, the employer can only ask for information pertaining to the disability for which the employee is seeking a reasonable accommodation. The employer should specify what kind of information it is seeking regarding the disability, its functional limitations, and the need for reasonable accommodation.

Practice Tip. Employees seeking reasonable accommodations should not sign broad releases that give the employer access to the employee's complete medical file. It is advisable that the employee only allow written communication between the employer and the medical professional so there is no question as to what information was exchanged. It may be preferable to submit a list of specific questions to the health-care professional.

If an employee fails to provide sufficient medical documentation after being given a reasonable opportunity to do so, an employer may request a medical examination by the employer's own health-care professional. Such an exam is at the employer's expense and must be job related and consistent with business necessity. The exam is limited to determining the existence of an ADA disability and the functional limitations that require reasonable accommodation.

Employers are not obligated to seek documentation from a medical professional. An employer may simply discuss the matter with the employee. Employees are often the best resource for understanding the limitations posed by their specific disability, what works best for them, how the disability affects their job, and suggestions for accommodating those limitations. However, the employer is not necessarily obligated to provide the reasonable accommodation that the employee wants. The employer only is obligated to provide a reasonable

accommodation that is effective. *EEOC v. Sears, Roebuck & Co.*, 417 F. 3d 789, 802 (7th Cir. 2005). An effective accommodation is one that allows an employee to attain the same level of performance as the employee's colleagues.

(3) Finding the Appropriate Accommodation [§ 8.19]

Although employees themselves may be the best resource for identifying the appropriate accommodation, there are other avenues to follow as well. It is helpful to identify what the limitation is that the employee is facing and then look at ways of addressing that limitation. One especially helpful resource is the Job Accommodation Network, www.askjan.org. This website includes accommodation ideas and resources for dozens of disabilities and the limitations one might expect that accompany that disability. Among the many disabilities addressed are mental health disabilities including anxiety disorder, bipolar disorder, depression, eating disorders, personality disorder, posttraumatic stress disorder, and schizophrenia. Among the developmental disabilities addressed are autism spectrum disorder, intellectual impairment, cerebral palsy, and spina bifida. In addition, the Job Accommodation Network offers a free service to call if an employer or an employee is struggling to identify an appropriate accommodation. Professional rehabilitation consultants can help identify useful accommodations and resources for obtaining them.

(4) Accommodations for Mental Health Disabilities and Developmental Disabilities [§ 8.20]

Accommodations must be determined on a case-by-case basis; the appropriate accommodation will depend both on the needs and limitations of the employee and the needs of the employer. Here is a sampling of common accommodations:

1. *Leave.* Generally, a leave of absence to obtain treatment or to recover is considered a reasonable accommodation. Some courts have limited the need to accommodate if the leave is extended or indefinite, *Byrne v. Avon Prods.*, 328 F.3d 379 (7th Cir. 2003), or if the leave is requested by a key employee and is at a critical time, *Stubbs v. MARC Ctr.*, 950 F. Supp. 889 (C.D. Ill. 1997).
2. *Change of supervisors.* A change in supervisor is usually not required as an accommodation. *Wernick v. Federal Reserve Bank of N.Y.*, 91 F.3d 379, 384 (2d Cir.1996) (failure to assign employee to work under different supervisor did not violate reasonable-accommodation requirement of ADA). But there is no per se rule that it could never be a reasonable accommodation. *Kennedy v. Dresser Rand Co.*, 193 F.3d 120 (2d Cir. 1999). However, adjusting supervisory methods, such as communication of assignments, method of providing feedback, and changing structure of the work, is a form of reasonable accommodation. U.S. EEOC, *Enforcement Guidance on the ADA and Psychiatric Disabilities* (Mar. 25, 1997) (see question 27), https://www.eeoc.gov/laws/guidance/enforcement-guidance-ada-and-psychiatric-disabilities.
3. *Modifying performance or conduct standards.* Generally, employees with disabilities are held to the same performance standards as employees without disabilities. If an employee's ability to perform the employee's job is being hindered by a disability, the employee should ask for a reasonable accommodation to help address the concern. Unfortunately, many times people with mental health disabilities wait until they are already facing discipline or a poor performance rating to disclose their disability and seek assistance. An employer need not withdraw discipline or corrective action plans that occurred before a disability was disclosed and an accommodation requested. Once an employee discloses a disability and suggests that their performance problems are related to the disability, the interactive process is triggered. The employer may still proceed with the discipline, but if it is short of termination, efforts at finding a reasonable accommodation that will help the employee improve their performance are required. If an employee's disability causes a violation of a conduct rule, the employer may still discipline the employee as long as the conduct rule is job related and consistent with business necessity. *See* U.S. EEOC, *Applying Performance and Conduct Standards to Employees with Disabilities* (Jan. 20, 2011), https://www.eeoc.gov/laws/guidance/applying-performance-and-conduct-standards-employees-disabilities.
4. *Job coaches.* The provision of a temporary job coach (a professional who assists people with disabilities with job placement and training) may be required unless it is an undue hardship for the employer. It may also be a reasonable accommodation to allow longer-term job coaches paid for by a public or private social service agency to accompany the employee at the job site or regularly check in with the employee. This is a common practice for employees with intellectual disabilities but may also be appropriate for individuals with significant mental illness. *See EEOC v. Wal-Mart Stores*, 345 F. Supp. 3d 1046 (W.D. Wis. 2018).
5. *Reassignment.* Reassignment to a vacant position may be a reasonable accommodation but is often considered a last resort. The employee with a disability must be qualified for the position, the employer is not required to bump another employee out of a position, and the employer is not required to create a position for the employee. *Cravens v. Blue Cross & Blue Shield of Kan. City*, 214 F.3d 1011, 1019 (8th Cir. 2000). Nor is the employer required to create a permanent light-duty position for an employee with a disability even if it offers such positions on a temporary basis to employees recovering from injuries. *Watson v. Lithonia Lighting*, 304 F.3d 749 (7th Cir. 2002). Where possible, the position should be comparable in pay and benefits to the employee's old position, but an employer would not be required to promote a person with a disability as reasonable accommodation. U.S. EEOC, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA* (Oct. 17, 2002), https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada.

(5) Other Accommodation Issues [§ 8.21]

Accommodations are not necessarily a one-and-done determination. Once an accommodation has been identified and implemented, it should be revisited after a reasonable time to ensure that it is working. If the accommodation is not meeting the needs of the employer or the employee, other accommodations should be considered and provided if appropriate. Over time, an individual's disability-related needs or a person's job duties may change. These things may be cause for reviewing and updating accommodations. "The duty to accommodate is a continuing one." *Cehrs v. Northeast Ohio Alzheimer's Rsch. Ctr.*, 155 F.3d 775,784 (6th Cir. 1995). There is no set limit to the number of accommodations a person may ask for, although at some point, the accommodations may cease to be reasonable or meet one of the other employer defenses described in sections 8.26–.29, *infra*.

Many accommodations can be provided at little or no cost to the employer. They may involve modifying the way the job is done or other policies. Other accommodations may only be a one-time expense. As mentioned above, the employer's obligation is to provide an effective accommodation, not necessarily the most complex or costly one and not necessarily the one requested by the employee. Generally, it is the employer's responsibility to pay for reasonable accommodations, but the employer can seek other sources as well. The employee may be able to get assistance from the Division of Vocational Rehabilitation to cover the cost of special equipment or other modifications. The employee could cover the cost of the accommodation if the employee so chooses. An employer is not required to pay for an employee's personal devices that the employee uses outside of work such as eyeglasses, hearing aids, or wheelchairs, unless there is a specific type of device required for the particular job.

Employees are not required to accept an accommodation. If an employer offers an accommodation and the employee rejects it, the employee is still required to perform the essential functions of the job. If the employee cannot do so, the employee is not a qualified individual with a disability within the protections of the act. 29 C.F.R. § 1630.9(d).

g. Burden of Proof [§ 8.22]

(1) Disability Claims Generally [§ 8.23]

To prove an ADA discrimination claim, a plaintiff must show that (1) he or she is disabled, (2) he or she is otherwise qualified to perform the essential functions of the job with or without reasonable accommodation, (3) he or she suffered an adverse employment action, and (4) the adverse action was caused by his or her disability. *Roberts v. City of Chi.*, 817 F.3d 561, 565 (7th Cir. 2016).

(2) Failure to Accommodate Claims [§ 8.24]

A prima facie failure to accommodate a claim requires the employee to show the following: (1) the employee is a person with a disability, (2) the employer had notice of the disability, (3) with a reasonable accommodation the employee could perform the essential functions of the job, and (4) the employer refused to provide such accommodation. *EEOC v. Sears Roebuck & Co.*, 417 F. 3d 789 (7th Cir. 2005).

(3) Failure to Engage in the Interactive Process [§ 8.25]

An employee can prove an accommodation claim based on the failure to engage in the interactive process by showing that (1) the employer knew of the disability, (2) the employee requested accommodations or assistance, (3) the employer did not make a good-faith effort to assist the employee in seeking accommodations, and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith. *Cravens v. Blue Cross & Blue Shield of Kan. City*, 214 F.3d 1011, 1021 (8th Cir. 2000); *see also EEOC v. Sears Roebuck & Co.* 417 F. 3d 789 (7th Cir. 2005).

h. Employer Defenses [§ 8.26]

(1) Disparate Treatment Defense [§ 8.27]

An employer can overcome the presumption of discrimination in response to a prima facie showing of disparate treatment by showing that the person with a disability was treated differently not because of the disability but because of a legitimate nondiscriminatory reason that is not pretextual.

(2) Undue Hardship [§ 8.28]

An employer is not required to provide a reasonable accommodation if it can show that doing so would pose an undue hardship on the employer. *Undue hardship* is defined as requiring significant difficulty or expense when considering such factors as the nature and cost of the accommodation, the overall resources of the employer including number of employees, the effect on expenses and resources, or the impact of the accommodation on the operation of the facility. 42 U.S.C. § 12111(10).

The determination of hardship is made on a case-by-case basis. An employer's broad assertions of hardship will not be enough to prove hardship. Undue hardship must be based on an individualized assessment of current circumstances that show a specific reasonable accommodation would cause significant difficulty or expense to the employer. If a particular accommodation poses a hardship, but there is another accommodation that is effective and does not pose a hardship, the employer is required to provide the latter accommodation.

An employer cannot claim undue hardship based on other employees' fears or prejudices toward the individual's disability, nor can undue hardship be based on customer fear or prejudices. Furthermore, an employer cannot claim undue hardship in the provision of a reasonable accommodation based on negative impact on the morale of other employees. Additionally, an employer cannot deny a reasonable-accommodation request with the often-used excuse, "If I do it for you, I will have to do it for everybody."

An employer may be able to claim undue hardship if the employee's accommodation would be unduly disruptive to other employees' ability to work or its ability to conduct business.

(3) Direct Threat [§ 8.29]

It is not discrimination under the ADA for an employer to refuse to hire or terminate a person with a disability who poses a direct threat to the health or safety of the individual or others. However, such a determination must be made on a case-by-case basis and cannot be based on speculation, myth, or stereotypes.

For example, in *Den Hartog v. Wasatch Academy*, 129 F.3d 1076 (10th Cir. 1997), the court upheld the termination of an employee without a disability because of the direct threat posed by the employee's adult son, who had bipolar disorder and who had threatened members of the community including at the employee's workplace.

To establish a direct-threat defense, an employer must show the following:

1. There is a significant risk of substantial harm—a slightly increased risk or one that is based on speculation is not sufficient.
2. The specific risk must be identified. When evaluating the risk the employer must consider (a) the duration of the risk, (b) the nature and severity of the potential harm, (c) the likelihood the potential harm will occur, and (d) the imminence of the potential harm. 29 C.F.R. § 1630.2(r).
3. The risk must be current. It cannot be based on speculation of future risk such as that the person's disability may become more severe or that the employer would see increased health insurance or worker's compensation costs.
4. The assessment of risk must be based on objective medical or other evidence related to a particular individual. It cannot be based on assumptions, fears, or stereotypes about a particular disability or diagnosis.

U.S. EEOC, *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act* 4.5 (Jan. 1, 1992), https://www.eeoc.gov/laws/guidance/technical-assistance-manual-employment-provisions-title-i-americans-disabilities-act.

And then, even if there is significant risk, reasonable accommodations to mitigate that risk must be considered. If there are reasonable accommodations that can be provided that would minimize or eliminate the risk, there is no longer a direct threat.

(4) Enforcement [§ 8.30]

Title I of the ADA is enforced by the U.S. Equal Employment Opportunity Commission (EEOC). Complainants (also sometimes referred to as charging parties) must file an administrative complaint within 300 days after the alleged discriminatory action. The statute's time limit is 180 days, but because the comparable Wisconsin law allows 300 days, the time limit is 300 days for a Wisconsin-based ADA claim as well. 42 § 12117(a); 42 U.S.C. § 2000e–5(e)(1). Filing a complaint with the administrative agency (the EEOC) is prerequisite to filing a claim in federal court. Exhaustion of administrative remedies is required.

After receiving a complaint, the EEOC assigns the matter for investigation. Within 10 days after filing, the EEOC must provide a copy of the complaint to the employer, which then has an opportunity to respond. The investigator then may request the charging party to

respond to or rebut the employer's position. The parties may be offered the opportunity to work with an EEOC mediator in an effort to resolve the complaint.

When the investigation is complete, the investigator will issue a "cause" decision. This may be a finding of no probable cause to believe there has been discrimination, or a finding of probable cause to believe there has been discrimination. This decision is accompanied by a notice, known as a *right-to-sue letter*. This letter advises that the charging party has 90 days to commence a legal action in federal court. In a limited number of cases, trial attorneys employed by the EEOC will take up the case to enforce the discrimination laws on behalf of the U.S. government, and the charging party then becomes an intervenor in that lawsuit.

i. Remedies [§ 8.31]

Remedies for violations of the employment provisions of the ADA depend on the nature of the claim alleged but may include hiring, reinstatement, promotion, back pay, front pay, reasonable accommodations, or other make-whole remedies. They also includes the payment of the plaintiff's costs and attorney fees.

In addition, the ADA, unlike the Wisconsin Fair Employment Act (WFEA) (discussed in sections 8.32–.50, *infra*), provides that compensatory and punitive damages may also be available. There are caps on the damages recoverable based on the size of the employer.

Employers of 15–100 employees: damages cannot exceed $50,000.
Employers of 101–200 employees: damages cannot exceed $100,000.
Employers of 201–500 employees: damages cannot exceed $200,000.
Employers of 501 or more employees: damages cannot exceed $300,000.

42 U.S.C. § 1981a(b).

B. The Wisconsin Fair Employment Act [§ 8.32]

1. In General [§ 8.33]

The Wisconsin Fair Employment Act, Wis. Stat. §§ 111.31–.395, and its protection of people with disabilities predated Title I of the ADA by several years. However, there are many ways in which the two laws are identical or at least very similar. Rather than repeat the provisions that are similar to the ADA, the differences in the language and interpretation of the two statutes are discussed below.

Wisconsin courts have been reluctant to use ADA decisions and Rehabilitation Act decisions as a guide for decisions on the WFEA. They have instead construed the WFEA in accordance with the Wisconsin Legislature's intentions rather than those of other jurisdictions. *McMullen v. LIRC*, 148 Wis. 2d 270, 275–76, 434 N.W.2d 830 (Ct. App. 1988).

2. Coverage [§ 8.34]

The WFEA applies to all employers. Even if an employer has only one employee, that employee is protected under the Act.

3. Definition of Disability [§ 8.35]

The WFEA protects people with a history of disability or who are regarded as disabled, as does the ADA.

However, the WFEA's definition of disability itself is different. "'Individual with a disability' means an individual who: (a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work; …" Wis. Stat. § 111.32(8).

This definition is further explained as requiring an employee to show one of the two prongs to prove disability.

A particular impairment makes achievement unusually difficult if that impairment places a substantial limitation on life's normal functions or a substantial limitation on a major life activity. *City of La Crosse Police & Fire Comm'n v. LIRC*, 139 Wis. 2d 740, 761, 407 N.W.2d 510 (1987). The second prong looks at whether the impairment limits the capacity to work in the particular job in question, not in a class of jobs or a broad range of jobs. *Id.* at 761–62 (citing *Brown Cnty. v. LIRC*, 124 Wis. 2d 560, 572, 369 N.W.2d 735 (1985)).

4. Prohibited Discrimination [§ 8.36]

The general provisions prohibiting discrimination for all protected classes under the WFEA include refusing to hire or employ, terminating employment, and discriminating against any individual in promotion, compensation, or in terms, conditions or privileges of employment, as retaliation against someone for seeking to protect rights under the WFEA. Wis. Stat. § 111.322.

The specific provisions addressing disability under Wis. Stat. § 111.34 are as follows:

Disability; exceptions and special cases

(1) Employment discrimination because of disability includes, but is not limited to:
(a) Contributing a lesser amount to the fringe benefits, including life or disability insurance coverage, of any employee because of the employee's disability; or
(b) Refusing to reasonably accommodate an employee's or prospective employee's disability unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise or business.
(2)(a) Notwithstanding s. 111.322, it is not employment discrimination because of disability to refuse to hire, employ, admit or license any individual, to bar or terminate from employment, membership or licensure any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment if the disability is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment, membership or licensure.
(b) In evaluating whether an individual with a disability can adequately undertake the job-related responsibilities of a particular job, membership or licensed activity, the present and future safety of the individual, of the individual's coworkers and, if applicable, of the general public may be considered. However, this evaluation shall be made on an individual case-by-case basis and may not be made by a general rule which prohibits the employment or licensure of individuals with disabilities in general or a particular class of individuals with disabilities.
(c) If the employment, membership or licensure involves a special duty of care for the safety of the general public, including but not limited to employment with a common carrier, this special duty of care may be considered in evaluating whether the employee or applicant can adequately undertake the job-related responsibilities of a particular job, membership or licensed activity. However, this evaluation shall be made on an individual case-by-case basis and may not be made by a general rule which prohibits the employment or licensure of individuals with disabilities in general or a particular class of individuals with disabilities.

5. Reasonable Accommodation [§ 8.37]

a. Job Functions [§ 8.38]

No distinction is made between marginal and essential functions under the WFEA. "A reasonable accommodation is not limited to that which would allow the employee to perform adequately all of his or her job duties. A change in job duties may be a reasonable accommodation in a given circumstance." *Crystal Lake Cheese Factory v. LIRC*, 2003 WI 106, 264 Wis. 2d 200, 664 N.W.2d 651, *abrogated on other grounds by Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21. The ADA, on the other hand, "does not require an employer to reallocate job duties in order to change the essential functions of a job." *Dey v. Milwaukee Forge*, 957 F. Supp. 1043, 1052 (E.D. Wis. 1996).

b. Clemency and Forbearance [§ 8.39]

The WFEA has been interpreted to require as a reasonable accommodation at least temporary clemency and forbearance from punishing an employee for issues related to a disability while the employee is undergoing treatment that, if successful, will remove the difficulty in performing the job-related responsibility. *Target Stores v. LIRC*, 217 Wis. 2d 1, 19, 576 N.W.2d 545 (1998).

c. Absences Related to Disability [§ 8.40]

Reasonable accommodation can excuse absences related to a disability from a no-fault attendance policy. *Goldsmith v. Sears Roebuck & Co.*, ERD Case No. 200203912 (LIRC June 29, 2006). However, see *Stoughton Trailers Inc. v. LIRC*, 2007 WI 105, ¶ 5, 303 Wis. 2d 514, 735 N.W.2d 477, in which the Wisconsin Supreme Court specifically said that it was not deciding whether termination for exceeding the number of absences allowed under a no-fault attendance policy when some of those absences are disability related is a termination because of disability under the WFEA. In that case, the court found that Stoughton Trailers had discriminated against Geen because it did not follow its own policies when it decided to terminate him.

Leave for a reasonable amount of time for treatment or medication adjustment is a reasonable accommodation. Leave for an indefinite amount of time with no indication of when the employee might be able to resume his or her duties is not reasonable. *King v. City of*

Madison, ERD Case No. CR 200502359 (LIRC Dec. 21, 2007).

d. Reduction of Hours [§ 8.41]

The WFEA has been found to require an employer to allow a reduction from full-time work to part-time work as a reasonable accommodation if hardship is not shown. *Gartner v. Hilldale, Inc.*, ERD Case No. 9001109 (LIRC May 12, 1992). Furthermore, if an employer does not prove hardship, it is a reasonable accommodation to allow an employee to work 8-hour shifts 5 days per week while the other employees work 12-hour shifts 3 days one week and 4 days the next. *Hutchinson Tech. v. LIRC*, 2004 WI 90, ¶ 36, 273 Wis. 2d 394, 682 N.W.2d 343. However, in *Staats v. County of Sawyer*, ERD Case No. 9500906 (LIRC Oct. 7. 1997), LIRC found that a personnel director with bipolar disorder who asked to limit his work to 40 hours per week and not be required to take work home with him was not entitled to such an accommodation because this accommodation would be a hardship on his employers and his disability was reasonably related to his ability to adequately undertake his job-related responsibilities.

6. Burdens of Proof [§ 8.42]

a. Discriminatory Treatment [§ 8.43]

A complainant in a disability discrimination case under the WFEA must first show that he or she is an individual with a disability and that the employer took one of the enumerated actions under Wis. Stat. § 111.322. *Crystal Lake Cheese Factory v. LIRC*, 2003 WI 106, ¶ 42, 264 Wis. 2d 200, 664 N.W.2d 651, *abrogated on other grounds by Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21. Those enumerated actions include refusing to hire, to fire, or to discriminate in promotion, compensation, or terms, conditions, or privileges of employment because of a person's disability. The burden then shifts to the employer to prove a defense under Wis. Stat. § 111.34. *Crystal Lake*, 2003 WI 106, ¶ 43, 264 Wis. 2d 200.

Discharge on the basis of disability might occur (1) when an employer takes an adverse action against an employee with a disability because of discriminatory animus, or (2) when the employer takes an adverse action against an employee because of performance deficiency caused by the employee's disability. *Fields v. State of Wis., UW Hosps. & Clinics*, ERD Case No. CR 200302716 (LIRC Feb. 12, 2007).

However, "an employer does not engage in intentional discrimination when it bases an adverse employment action on the employee's conduct unless the employee proves the employer knew his disability caused his conduct." *Wisconsin Bell v. LIRC*, 2018 WI 76, ¶ 41, 382 Wis. 2d 624, 648, 914 N.W.2d 1. In situations in which the factual question of causation is complex or technical so that a lay fact-finder would be speculating without the assistance of expert testimony, the absence of expert testimony constitutes an insufficiency of proof. *Wal-Mart Stores, Inc. v. LIRC*, 2000 WI App 272, 240 Wis.2d 209, 621 N.W.2d 633.

Once that is established, the burden of proof falls to the employer to justify its actions under the exception in Wis. Stat. § 111.34(2) that the disability is reasonably related to the employee's ability to adequately undertake the job-related responsibilities. At this point the provision of a reasonable accommodation comes into play.

b. Failure to Accommodate [§ 8.44]

An employee has the initial burden of proof to show there is a reasonable accommodation that would allow the employee with a disability to perform the employee's job. *Hutchinson Tech. v. LIRC*, 2004 WI 90, ¶ 35, 273 Wis. 2d 394, 682 N.W.2d 343. The burden then shifts to the employer to show that the accommodation was either unreasonable or a hardship. These are two separate inquiries. *Id.* ¶ 36. Hardship cannot be based on speculation or theoretical complaints. *Id.* A reasonable accommodation is one that is effective. *Gamroth v. Department of Corr.*, ERD Case No. CR 200303157 (LIRC Oct. 20, 2006). Although the WFEA does not specifically mention an interactive process for determining reasonable accommodations, and failure to engage in the interactive process is not in and of itself a violation of the law, the question is whether if the employer had engaged in the process, the employer and the employee could have identified a reasonable accommodation. *Id.*

7. Employer Defenses [§ 8.45]

a. Hardship [§ 8.46]

An employer can refuse to provide an accommodation under the WFEA if doing so would impose a hardship. The question whether a particular accommodation works a hardship on a specific individual is a factual determination that must be addressed on a case-by-case basis. *Janocik v. Heiser Chevrolet*, ERD Case No. 9351310(LIRC Nov. 21, 1994). The WFEA does not provide a definition of hardship, but case law, as mentioned above, indicates that it is not based on speculation or theoretical complaints, *Hutchinson Tech. v. LIRC*, 2004 WI 90, 273 Wis. 2d 394, 682 N.W.2d 343. A potential morale problem among other employees is not a hardship, *Parker v. Dane Cnty.* (LIRC Nov. 10, 2003), *aff'd. sub nom. Dane Cnty. v. LIRC* (Dane Cnty. Cir. Ct. July 20, 2004), and if an employer contends that an accommodation is too expensive, it must present evidence of its revenue and costs that would give the decision-maker a context to consider whether the expenditure would create a hardship, *Gilbertson v. Redi-Mix, Inc.* (LIRC Jan. 20, 2017).

b. Accommodation Not Reasonable [§ 8.47]

To be a reasonable accommodation, an accommodation must effectively allow the employee to carry out the employee's job duties. If an employer offers an accommodation that effectively eliminates the conflict between the disabled employee's abilities and the job requirements, and that reasonably preserves the affected employee's employment status, the accommodation requirement has been satisfied. *Owen v. American Packaging Co.*, ERD Case No. 8920686 (LIRC Feb. 1, 1991).

c. Disability is Reasonably Related to Individual's Ability to Adequately Undertake Job-Related Responsibilities [§ 8.48]

If a disability interferes with an individual's ability to adequately perform the individual's job responsibilities, and there is not an accommodation that would be effective, the employer is allowed to terminate the individual.

Examples. A man whose depression caused him to react violently toward his managers and coworkers, screaming, swearing, and hurling clipboards at them, and ultimately threatening to kill himself and others, was considered not qualified for his job. A disability that causes such conduct is reasonably related to the complainant's ability to adequately undertake the job-related responsibilities of the job. *Sampson v. S&S Distrib.*, ERD Case No. 199702048 (LIRC Nov. 19, 1999).

An employee was not "adequately undertaking the job-related responsibilities of her employment when she spent most of the day engaging in bothersome, disruptive and sometimes threatening interactions with co-workers." The employer repeatedly tolerated unsatisfactory behavior because of a concern that it might be a remediable product of a mental illness. The employer attempted to accommodate the employee; however, for the accommodations to be successful, the employee's participation in treatment was essential. Once the employee decided that she would not cooperate in treatment recommendations, there was no further accommodation the employer could make that would eliminate the problem that interfered with her ability to do her job. *Walk v. Ansul Fire Prot.*, ERD Case No. 199555512 (LIRC July 20, 1998).

An employee exhibited symptoms characteristic of a psychotic-manic episode at work. The employee's position involved reprocessing and decontaminating surgical implements for a health-care facility. The employee would pose a danger to himself and others in his work setting if he suffered another manic episode. Therefore, the employer's actions fell under the exception to prohibited discrimination set forth in Wis. Stat. § 111.34(2)(a). *Schilling v. UW-Madison* (Wis. Pers. Comm'n Nov. 6, 1991).

8. Enforcement [§ 8.49]

The WFEA is enforced by filing a complaint with the Wisconsin Equal Rights Division (ERD). Complaints must be filed within 300 days after the event giving rise to the complaint. The administrative process is the only avenue allowed under the law. The ERD assigns the complaint to an investigator and sends a copy of the complaint to the employer. The employer is given an opportunity to respond to the complaint. The ERD shares the employer's response with the employee, who is given an opportunity to rebut the employer's position or offer evidence of the employee's own, including identifying witnesses.

The investigator issues an initial determination on whether there is probable cause to believe discrimination has occurred. If the finding is probable cause, the matter is referred to an ERD administrative law judge (ALJ) for a hearing on the merits. If the decision is no probable cause and the employee chooses not to appeal that decision, the matter is closed. If the employee chooses to appeal a no-probable-cause decision, the matter is referred to an ALJ for a hearing on cause.

A prehearing conference will be set up, at which the parties are expected to discuss timelines for a hearing, discovery, and the exchange of witness and exhibit lists with the judge. The parties can also agree to attempt to resolve the matter by going to mediation. If the parties agree to mediation, the mediation will be assigned to another ALJ, who will act as mediator. If the parties do not agree to mediation or mediation is unsuccessful, the matter will proceed to a hearing.

After a hearing, the parties are given an opportunity to make closing arguments or submit legal briefs. After the record is closed, the ALJ issues a written decision. The decision is appealable by either party to LIRC. LIRC will allow for legal briefs and will issue a decision based on the administrative hearing record. The LIRC decision is appealable to the circuit court under Wis. Stat. ch. 227. The circuit court bases its decision on the record below.

9. Remedies [§ 8.50]

The remedies available under the WFEA are similar to those available under Title I of the ADA, but compensatory and punitive damages are not available under the WFEA.

The EEOC and the ERD have a work-sharing agreement. Because the statutes that each agency enforces are similar, a complainant need file with only one of them and the complaint will automatically be cross-filed with the other agency, if it has jurisdiction. (The EEOC does not have jurisdiction over employers with fewer than 15 employees.) This preserves the employee's rights to pursue remedies under both laws without worrying about the statute of limitation running on the other statute. Whichever agency receives the complaint will be the one to investigate it. The complaint will proceed through that agency's process until a final determination has been made. Usually, an agency will adopt the final determination of the other agency as its own unless the complainant specifically requests an independent investigation.

Practice Tip. What should an aggrieved employee do: file with the EEOC or with the ERD? The answer to that depends on several factors. First, as outlined above, there are some differences between the ADA and the WFEA, and one law might favor the fact situation more than the other. The WFEA, for example, has a broader definition of reasonable accommodation, and the ADA has stricter requirements for use of the direct-threat defense.

Another factor might be the availability of legal representation. Both agencies are designed so that individuals can file complaints without the need for legal counsel but, as things progress, especially once someone is given a right-to-sue letter from the EEOC, the need for the assistance of legal counsel increases.

An administrative hearing process at the ERD might be less intimidating to someone than filing in federal court. But the ability to seek compensatory and punitive damages might suggest the EEOC process is the way to go. Historically, the ERD process had been a little quicker, but in recent years the EEOC has changed the way it processes charges so there is no longer a significant difference.

III. Community Living [§ 8.51]

A. Title II of the ADA [§ 8.52]

1. Coverage and Requirements [§ 8.53]

Title II of the ADA prohibits discrimination against people with disabilities in programs and services of state and local governments. This includes all public services, including parks and recreation programs, libraries, social service programs, law enforcement, courts, and jails and prisons.

The definition of disability under Title II is the same as under Title I discussed above. To be a *qualified individual with a disability* for Title II purposes, one must be an individual with a disability who meets the essential eligibility requirements for receipt of services or participation in the public entity's programs, activities, or services with or without (1) reasonable modifications to a public entity's rules, policies, or practices; (2) removal of architectural, communication, or transportation barriers; or (3) provision of auxiliary aids and services. 28 C.F.R. § 35.104.

Title II prohibits the denial of services or benefits on the basis of disability. It requires that individuals with disabilities are provided an equal opportunity to participate in or benefit from a public entity's aids, benefits, or services. It does not require a guarantee of equal results. 28 C.F.R. § 35.130.

A governmental entity may offer separate or special programs for people with disabilities if necessary to provide individuals with disabilities equal opportunity to benefit. However, such a program must be specially designed to meet the needs of individuals for whom they are provided. Even if a special program is offered to people with disabilities, a qualified individual with a disability cannot be excluded from the regular program. *Id.*

Services are to be provided in the most integrated setting appropriate to the needs of qualified individuals with disabilities. 28 C.F.R. § 35.130(d).

2. Reasonable Modifications [§ 8.54]

A governmental entity must reasonably modify its policies, practices, or procedures when necessary to avoid discrimination, unless it would fundamentally alter the nature of the service, program, or activity. 28 C.F.R. § 35.130(b)(7). Included among reasonable modifications are such things as granting zoning variances for the location of a group home for people with disabilities or providing assistance to someone applying for government-provided benefits who cannot fill out the application because of their disability.

3. Programmatic Access [§ 8.55]

Public entities must provide programmatic access for people with disabilities. 28 C.F.R. § 35.149. This might include making structural changes to provide physical access to buildings, moving programs to an accessible location, or bringing services to an individual.

Example. A prison program that allow inmates to earn earlier release by completing the program must be accessible to inmates with disabilities who qualify for the program, even if accessibility requires making structural modifications to the place where the program is offered or moving the program to an accessible location.

Public entities must operate each service, program, or activity so that, when viewed in its entirety, it is readily accessible to and usable by individuals with disabilities. 28 C.F.R. § 35.150(a). Accessibility may be achieved by redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, alteration of existing facilities, new construction, etc. 28 C.F.R. § 35.150(b). New construction commenced after January 26, 1992, must meet accessibility standards. U.S. DOJ, *2010 ADA Standards for Accessible Design*, https://www.ada.gov/regs2010/2010ADAStandards/2010ADAstandards.htm (Sept. 15, 2010).

4. Auxiliary Aids and Services and Effective Communication [§ 8.56]

A public entity must provide auxiliary aids and services necessary for a person with a disability to have an equal opportunity to participate in and enjoy the benefits of a service, program, or activity. 28 C.F.R. § 35.160(b). *Auxiliary aids and services* are things that allow for effective communication with a person with a disability. Effectiveness depends on the individual's needs and the length and complexity of the communication.

Example. A person who is deaf may need an American Sign Language interpreter provided for an interview, class, or court appearance, because these are all complex-communication situations. The same person may be communicated with effectively by pen and paper for a simple exchange, such as scheduling an appointment. Auxiliary aids and services do not include personal devices, such as hearing aids, eyeglasses, or wheelchairs, and the public entity is not obligated to provide them, even if the person with a disability requires them to access a program or service. 28 C.F.R. § 35.135.

5. Integration Mandate [§ 8.57]

The U.S. Supreme Court laid out what has come to be known as the ADA's integration mandate in *Olmstead v. L.C.*, 527 U.S. 581 (1999). The *Olmstead* case was brought by two women both of whom had dual diagnoses of intellectual disabilities and psychiatric disabilities. They were institutionalized in a state hospital, despite their treatment professional advising that they could appropriately be served in community-based programs. They wanted to be released from the institution and into the community. The state objected, claiming it did not have the funds to serve them in the community, and it would be fundamental alteration to serve them in a community setting.

The *Olmstead* Court held that Title II of the ADA requires states to provide community-based treatment for people with mental disabilities when the state's treatment professionals determine such placement is appropriate, the individual with a disability does not oppose such placement, and the placement can be reasonably accommodated, taking into account the resources of the state and the needs of others with mental disabilities. *Id.* at 603. States can avoid liability under *Olmstead* by claiming a fundamental-alteration defense, *see infra* § 8.58, if they can demonstrate that the state had a plan for providing individuals with disabilities opportunities to live, work, and be served in integrated settings.

> If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met.

Id. at 605.

Since the *Olmstead* decision, many states have worked to close state-run institutions and increase community-based programs to serve people with mental health disabilities and intellectual disabilities in the community. See chapter 9, *infra*, for more information on benefits available to individuals with such disabilities.

6. Public Entity Defense to Providing Reasonable Modifications [§ 8.58]

A public entity is required to make reasonable modifications in policies, practices, or procedures when necessary to avoid disability discrimination, unless the entity can demonstrate that making the modifications would fundamentally alter the nature of the program, service, or activity. 28 C.F.R. § 35.130(b)(7). A *fundamental alteration* is a change that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages, or accommodations offered by a business. ADA Nat'l Network, *Glossary of ADA Terms*, https://adata.org/glossary-terms (last updated June 2021).

7. Direct Threat [§ 8.59]

A public entity need not permit an individual to participate in or benefit from a service, program, or activity when that individual poses a direct threat to the health or safety of others. A direct-threat determination must be an individualized assessment based on reasonable judgment that relies on current medical knowledge or best available objective evidence regarding the nature, duration, and severity of the risk, the probability that injury will actually occur, and whether reasonable modifications of policies, practices, or procedures will mitigate that risk. 28 C.F.R. § 35.139.

Example. A public entity cannot prohibit participation by an individual with an intellectual disability in a recreational softball program because it believes the person's slower reaction time could result in injury to the person or another player. The risk of such an injury is minimal and could be mitigated by having the person team up with another player or by implementing some other modification. Similarly, a person with schizophrenia cannot be denied participation in a county-run support group based on fears that someone with that diagnosis is dangerous or may harm others in the group. There would have to be an individualized assessment as discussed above.

8. Enforcement [§ 8.60]

Complaints must be filed within 180 days after the discriminatory act(s). Enforcement of the provisions of Title II can take several forms.

1. *Administrative complaint.* A complaint may be filed with (1) any federal agency that provides funding to the public entity that is the subject of the complaint; (2) a federal agency that is designated in the Title II regulation to investigate Title II complaints based on their area of responsibility (Department of Agriculture, Department of Education, Department of Health and Human Services, Department of Housing and Urban Development (HUD), Department of the Interior, Department of Justice, Department of Labor, Department of Transportation); or (3) the Department of Justice (DOJ). Complaints filed with the DOJ may be referred to another appropriate federal agency. After receiving a complaint, the relevant agency may investigate it, refer it for mediation, work out a voluntary compliance agreement, or send the complaining party a letter stating that the agency is not making a determination on the merits but does not have the resources to further pursue the complaint.
2. *Lawsuit.* An individual who believes his or her rights under Title II have been violated can file a lawsuit in federal district court. There is no administrative remedy exhaustion requirement under Title II as there is under Title I.

Practice Tip. The DOJ receives far more ADA complaints than it can process. It is not unusual for the time for response to a complaint to be many months. If the DOJ offers a referral to the mediation service it contracts with, it might be wise for the complainant to agree to mediation for a faster resolution. It is also possible to ask the DOJ to refer the matter to the local U.S. Attorney, who might be willing to attempt to negotiate a resolution.

9. Remedies [§ 8.61]

Public entities can be ordered to remedy the violation and change their policies or procedures. If the entity receives federal funding, termination of the funding is an enforcement option. Compensatory damages may be available if a plaintiff can show intentional discrimination. There is no provision in the federal law for punitive damages, but they might be available if an analogous state statute allows them.

Prevailing parties, other than the United States, may recover attorney fees and costs. 28 C.F.R. § 35.175. However, the defendant is not entitled to them unless the court finds that the plaintiff's action was frivolous, unreasonable, or without foundation.

B. Title III of the Americans with Disabilities Act [§ 8.62]

1. Coverage [§ 8.63]

The basic definition of disability under Title III is the same as under Title I.

Title III of the ADA is very similar to Title II in the terms of its requirements. Title III applies to places of public accommodations and commercial facilities. Places of public accommodation are facilities whose operations affect commerce and fall within at least one of the following categories:

1. Places of lodging (except for owner-occupied establishment renting fewer than six rooms);
2. Establishments serving food or drink;
3. Places of exhibition or entertainment (theaters, concert halls, movie theaters);
4. Places of public gathering (auditoriums, convention centers);
5. Sales or rental establishments (bakeries, grocery stores, shopping centers, hardware stores, or other sales or rental establishments);
6. A laundromat, dry cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health-care provider, hospital, or other service establishment;
7. A terminal, depot, or other station used for specified public transportation;
8. A museum, library, gallery, or other place of public display or collection;
9. A park, zoo, amusement park, or other place of recreation;
10. A nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
11. A daycare center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; or
12. A gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

28 C.F.R. § 36.104.

Private clubs are not considered places of public accommodation. Religious entities also are exempt from Title III's requirements. 28 C.F.R. § 36.102(e).

In addition to the places of public accommodation listed above, Title III applies to examinations and courses. A private entity that offers examinations and courses must offer them in a place and manner that is accessible to people with disabilities. This also includes making modifications to the examination and providing auxiliary aids and services, unless doing so would fundamentally alter the examination or course or result in an undue burden. 28 C.F.R. § 36.309.

2. Prohibitions and Requirements [§ 8.64]

A public accommodation cannot discriminate against a person with a disability. People with disabilities cannot be denied full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations offered by a public accommodation. This includes equal opportunity to participate and to benefit, and the receipt of benefits must be in the most integrated setting appropriate and not a different or separate manner unless such action is necessary to provide the person(s) with disabilities services that are as effective as those provided to others. 28 C.F.R. § 36.202.

Example. A coffee shop cannot bar an individual with a mental illness from its facility merely because the individual is known to have a mental health disability.

A public accommodation cannot impose eligibility criteria that screen out or tend to screen out people with disabilities. 28 C.F.R. § 36.301.

3. Reasonable Modifications [§ 8.65]

Like the requirement under Title II, public accommodations must make reasonable modifications in policies, practices, or procedures that are necessary to allow people with disabilities equal access or opportunity. 28 C.F.R. § 36.302.

Example. A department store might need to modify its policy of allowing only one person in a dressing room at a time, if an individual with an intellectual disability needs the assistance of a companion.

4. Provision of Auxiliary Aids and Services [§ 8.66]

Again, as in Title II, a public accommodation must provide auxiliary aids and services that are necessary to ensure equal access unless doing so would be an undue burden or a fundamental alteration. 28 C.F.R. § 36.303. Auxiliary aids and services include such things as notetakers, transcription services, assistive-listening devices, closed captioning, and American Sign Language interpreters.

Example. A movie theater must provide an assistive-listening device for a patron who has hearing impairments and requires it to adequately hear the movie. The movie theater would not have to provide personal devices such as hearing aids.

People with disabilities cannot be subject to a surcharge for auxiliary aids and services. For example, an attorney cannot charge a client who needs an American Sign Language interpreter to effectively communicate in office meetings for the cost of the interpreter or charge a higher hourly fee because of the need, unless to do so would place an undue burden on the attorney, as discussed more below. In court, the cost of the interpreter would be covered by the court system under Title II.

5. Structural Modifications [§ 8.67]

Title III entities are required to perform what is called "readily achievable barrier removal." A public accommodation must remove architectural barriers in existing facilities where such removal is easily accomplished without much difficulty or expense. 28 C.F.R. § 36.304. Examples of this include installing ramps, adding curb cuts, creating clear paths of travel, and adding grab bars in toilet rooms.

New-construction requirements for facilities whose first occupancy was after January 26, 1993, apply to both public accommodation and commercial facilities. Commercial facilities are private entities whose operations affect commerce that are intended for nonresidential use. Commercial facilities do not include facilities covered under the Fair Housing Act (*see generally infra* §§ 8.82–.90), aircraft, or railroad cars and other railroad vehicles. 28 C.F.R. § 36.104. Newly constructed facilities must be readily accessible and usable by people with disabilities. They must be built in compliance with the ADA accessibility guidelines. *See* U.S. DOJ, *2010 ADA Standards for Accessible Design*, https://www.ada.gov/regs2010/2010ADAStandards/2010ADAstandards.htm (Sept. 15, 2010).

6. Public Accommodation Defenses [§ 8.68]

A public accommodation may be relieved of its obligation to provide reasonable modifications or auxiliary aids and services if the provision of reasonable modifications or auxiliary aids and services would result in a fundamental alteration or an undue burden.

Undue burden is defined as "significant difficulty or expense." The definition is the same as the undue hardship defense under Title I of the ADA as outlined above. A fundamental alteration is a modification that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages, or accommodations offered. If a particular auxiliary aid or service would result in an undue burden or a fundamental alteration, the public accommodation must provide an alternative auxiliary aid or service that would not be an undue burden or fundamental alteration. *See* 28 C.F.R. § 36.303.

The direct-threat defense is also available. A public accommodation need not allow an individual with a disability to participate in or benefit from the goods, services, facilities, privileges, advantages, and accommodations of the public accommodation if the individual poses a direct threat to the health or safety of others. The standards for a direct-threat determination are the same as those under Title II above: A direct threat must be a significant risk that cannot be eliminated by reasonable modification and must be based on an individualized assessment, current medical knowledge, or best-available objective evidence. 28 C.F.R. § 36.208.

7. Enforcement [§ 8.69]

Title III of the ADA may be enforced in two ways. First, individuals who are being subjected to discrimination or who have reasonable ground to believe they are about to be subjected to discrimination can bring private suits. Second, individuals can file a complaint with the DOJ. If the DOJ has reasonable cause to believe there is a pattern or practice of discrimination or discrimination that raises an issue of general public importance, attorneys from the DOJ may take up the case. 28 C.F.R. § 36.501. There is no administrative-remedy-exhaustion requirement.

8. Remedies [§ 8.70]

The remedies available in a private suit include a permanent or temporary injunction, a restraining order, orders to make facilities readily accessible to or usable by people with disabilities, and orders requiring the provision of auxiliary aids and services. Remedies do not include compensatory or punitive damages. 28 C.F.R. § 36.501. However, if the DOJ brings a civil action, all the same remedies are available and, in addition, if requested by the DOJ, compensatory damages including pain and suffering and out-of-pocket expenses. The DOJ also can seek civil penalties against the public accommodation, which may increase with successive violations. 28 C.F.R. § 36.504.

Prevailing parties, other than the United States, may recover attorney fees and costs. 28 C.F.R. § 36.505. However, the defendant is not entitled to them unless the court finds that the plaintiff's action was frivolous, unreasonable, or without foundation.

C. Places of Public Accommodation or Amusement—Wisconsin Law [§ 8.71]

1. In General [§ 8.72]

The Wisconsin Public Accommodation or Amusement Law (WPAAL) prohibits discrimination against people with disabilities among other protected classes.

2. Coverage [§ 8.73]

The WPAAL borrows its definition of disability from the Wisconsin Open Housing Law (*see generally infra* §§ 8.91–.94).

Disability is defined as:

> A physical or mental impairment that substantially limits one or more major life activities, a record of having such an impairment, or being regarded as having such an impairment. "Disability" does not include the current illegal use of a controlled substance, as defined in s. 961.01(4), or a controlled substance analog, as defined in s. 961.01(4m), unless the individual is participating in a supervised drug rehabilitation program.

Wis. Stat. § 106.50(1m)(g).

A *public accommodation* is defined as follows:

> 1. "Public place of accommodation or amusement" shall be interpreted broadly to include, but not be limited to, places of business or recreation; lodging establishments; restaurants; taverns; barber, cosmetologist, aesthetician, electrologist, or manicuring establishments; nursing homes; clinics; hospitals; cemeteries; and any place where accommodations, amusement, goods, or services are available either free or for a consideration, subject to subd. 2.
> 2. "Public place of accommodation or amusement" does not include a place where a bona fide private, nonprofit organization or institution provides accommodations, amusement, goods or services during an event in which the organization or institution provides the accommodations, amusement, goods or services to the following individuals only:
> a. Members of the organization or institution.
> b. Guests named by members of the organization or institution.
> c. Guests named by the organization or institution.

Wis. Stat. § 106.52(1)(e)

Wisconsin does not have a state statute covering governmental entities that parallels Title II of the ADA. However, although not spelled out directly in the statute, the WPAAL has been interpreted to include coverage of governmental entities when they offer services and amusements like those listed above. LIRC has explained as follows:

> The commission disagrees with the ALJ's proposition that no government agency/entity is subject to coverage under the WPAAL. There are a variety of government entities that supply necessities and/or comforts of the kind offered by the businesses enumerated in the statute. The State itself, through the Department of Natural Resources, provides places for outdoor recreation including camping, hunting and fishing. County and local governments also provide such places of recreation for the public. Further, various hospitals and nursing homes are government-owned and operated. Such government entities supply the necessities and/or comforts of the kind offered by the businesses listed in the WPAAL's definition of public place of accommodation or amusement.
>
> The commission believes that it would be anomalous that the statute be construed so as to allow a government entity to engage in the very conduct which the statute has been enacted to prohibit. The commission simply does not believe that the Legislature intended that government entities that supply the necessities and/or comforts of the kind offered by the businesses listed in the WPAAL's definition of public place of accommodation or amusement were to be excluded from coverage under the WPAAL.

Duarte-Vestar v. Department of Admin., ERD Case No. CR200804400 (LIRC Oct. 16, 2009)

3. Prohibitions [§ 8.74]

The WPAAL provides that a place of public accommodation cannot, because of a person's disability, deny a person full and equal enjoyment of any public place of accommodation or amusement. Nor can a place of public accommodation or amusement charge a person with a disability a higher price than the regular rate. The WPAAL prohibits advertising, publishing, or mailing any communication that would indicate that a place of accommodation or amusement would be denied to a person based on disability. Additionally, the statute prohibits refusing to furnish or charging a higher rate for automobile insurance on the basis of disability.

The WPAAL has some special protections for people with disabilities accompanied by service animals and service animal trainers. Those are discussed in section 8.79, *infra*.

The WPAAL does not require reasonable accommodations or reasonable modifications. Nor does it require the provision of auxiliary aids and services. It does not have any requirements addressing accessibility. As noted above and discussed at section 8.79, *infra*, the only modification of policy it requires deals with service animals.

4. Enforcement and Remedies [§ 8.75]

The WPAAL is enforced by filing a complaint with the ERD in the Department of Workforce Development (DWD) within 300 days after the alleged discriminatory event. The ERD will conduct an investigation and make an initial determination on probable cause. The parties can agree to try to mediate a resolution.

The next step is a hearing before an ALJ. If the matter proceeds to a hearing before an ALJ, the ALJ has the power to order such actions by the respondent that will effectuate the purpose of the act. An appeal of the ALJ decision goes to LIRC. An appeal of the LIRC decision is an appeal to circuit court. The circuit court is a trial de novo and can be a jury trial. Wis. Stat. § 106.52(4).

However, the case may get to the circuit court quicker in one of two ways. The DWD with the assistance of the Wisconsin Department of Justice can file a complaint in the circuit court any time after a complaint is filed seeking a restraining order or injunction. Wis. Stat. § 106.52(4)(a)5. In addition, a person, including the state, alleging a violation may bring a civil action for appropriate injunctive relief, for damages including punitive damages, and, in the case of a prevailing plaintiff, for court costs and reasonable attorney fees within one year after the discriminatory act. Wis. Stat. § 106.52(4)(e).

D. Service Animals and Emotional Support Animals [§ 8.76]

1. In General [§ 8.77]

People with mental health disabilities and people with developmental disabilities often benefit from the presence of animals; however, figuring out which rules apply and when they apply can be complicated. Service animal and emotional support animal regulations take several, sometimes conflicting, forms. Service animals are primarily covered by the ADA and the WPAAL. Emotional support animals, sometimes called companion animals or therapy animals, are primarily addressed in the Fair Housing Amendments Act of 1988 (FHA) and the Wisconsin Open Housing Law.

2. Service Animals [§ 8.78]

Under the ADA, 28 C.F.R. § 35.136, service animals are limited to dogs and, to a lesser extent, miniature horses. *Service animals* are dogs that are trained to perform a task or service for a person with a disability who needs that assistance because of their disability. There are a large variety of tasks that a dog could be trained to do, including leading a person with visual impairments, alerting a person who is deaf or hard of hearing, and retrieving objects for someone with limited mobility. For people with mental illness, service animals may be trained to remind someone to take prescribed medications or to calm someone experiencing an anxiety attack. For an autistic person, a service dog may help with calming or interrupting self-harming behavior. While a service dog must be trained to do a service or task, there is no particular certification required, nor are service dogs required to wear vests or harnesses.

Under both Title II and Title III of the ADA, service animals are allowed to accompany a person with a disability anywhere the public is allowed to go. There is a very narrow exception for places such as surgery rooms and burn units where the dog's presence may compromise a sterile environment. Service dogs are allowed in psychiatric wards as well. 28 C.F.R. § 35.136(g); 28 C.F.R. § 36.302(c)(7).

Service dogs are not "pets" and cannot be subject to pet fees, as may be charged by hotels or other lodging places. However, if a hotel routinely charges for damage caused by a guest, the hotel could charge for damage caused by a service animal. 28 C.F.R. § 35.136(h).

A service animal must be under the control of its handler. This may be the person with a disability or, in some cases, a caregiver or companion who accompanies the person with a disability. Under the ADA, service animals must be harnessed, leashed, or tethered, unless the individual's disability prevents using these devices or these devices interfere with the service animal's safe and effective performance of tasks. 28 C.F.R. § 35.136(d).

Care of the animal, including feeding and taking the dog out, are the responsibility of the person with a disability or his or her companion or caregiver. Staff of facilities are not responsible for caring for the dog. 28 C.F.R. § 35.136(e).

Service dogs are not limited by breed or size.

Only limited inquiries are allowed by staff of a public entity or public accommodations. Staff may ask only two questions regarding a service animal: (1) whether the dog is a service animal required because of a disability, and (2) the nature of the work or tasks the dog has been trained to perform. An individual cannot be required to demonstrate the dog performing the tasks. If the disability and tasks are obvious, such as a dog leading a blind person, then even limited questioning is not appropriate. 28 C.F.R. § 35.136(f).

3. Service Animals Under Wisconsin Law [§ 8.79]

The WPAAL also addresses service animals. The WPAAL provides that service animals and animals being trained as service animals are allowed equal access, unless allowing the animal would be a "fundamental alteration in the nature of the accommodations, amusement, goods, or services provided, or would jeopardize the safe operation of the public place of accommodation or amusement." Wis. Stat. § 106.52(3)(am)3.

The Wisconsin definition of *service animal* differs from the ADA definition:

> Service animal means a guide dog, signal dog, or other animal that is individually trained or is being trained to do work or perform tasks for the benefit of a person with a disability, including the work or task of guiding a person with impaired vision, alerting a person with impaired hearing to intruders or sound, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.

Wis. Stat. § 106.52(1)(fm).

Wisconsin law, unlike the ADA, does not limit the service animal to dogs. Additionally, the WPAAL protections cover service animals in training, which are not protected under the ADA. Service animals in training are allowed equal access to that allowed service animals. However, Wisconsin law does impose different requirements. A service animal in training must wear a harness or leash and a special cape, and the trainer may be required to provide certification or credentials from a school for training service animals. A person with a disability cannot be asked for certification or credentials, but they can be asked if the service animal is required because of a disability. Wis. Stat. § 106.52(3)(am)2.

IV. Housing [§ 8.80]

A. Emotional Support Animals [§ 8.81]

While service animals are allowed almost everywhere, emotional support animals are not. Emotional support animals are sometimes referred to as therapy animals and companion animals. Emotional support animals are allowed under the Fair Housing Act Amendments Act of 1988 (FHA), 42 U.S.C. §§ 3601–3631. HUD published guidance addressing both service animals and emotional support animals in a memo dated January 28, 2020. *See infra* § 8.123 (Additional Resources: Housing). HUD has combined service animals and emotional support animals under the label "assistance animals."

Allowing the assistance of service animals and emotional support animals is considered a reasonable accommodation and is treated as such under the FHA (*see infra* § 8.86). See also *Bronk v. Ineichen*, 54 F.3d 425 (7th Cir. 1995), in which the Seventh Circuit found that a hearing assistance dog for two deaf tenants was per se reasonable within the meaning of the FHA.

People with disabilities may ask for a reasonable accommodation to have an emotional support animal, even if the landlord has a no-pets policy. Emotional support animals are not considered pets, and they are not subject to pet fees or additional security deposits. Allowed inquiries are limited to (1) whether the person has a disability, if it is not obvious; and (2) whether the person has a disability-related need for the animal.

If the disability is not obvious, a landlord can ask for documentation of the disability. This could be provided through such documents as Social Security disability determinations or information confirming disability from a health-care professional. The landlord may ask for documentation in support of the second question as well. This could be documentation from health-care professionals confirming the connection between the disability and the need for the animal. The acceptable medical inquiry is limited. Providing details about the diagnosis or severity of an individual's disability or medical records or a medical examination cannot be required.

Dogs are not the only animals that can be used as emotional support animals. HUD has made distinctions between animals commonly kept in households, which includes dogs, cats, small birds, rabbits, hamsters, gerbils, other rodents, fish, turtles, and other small, domesticated animals that are traditionally kept in the home, and other animals. Other "unique" animals may be allowed but could require additional justification as to why that particular type of animal is needed. This may be because of unique capabilities to perform tasks for the person with a disability or it may be due to allergies the person with a disability has to other animals.

An assistance animal is allowed on the premises including common areas. The animal must be under the control and care of the person with a disability. Landlords cannot limit the breed or size of an animal, but they can prohibit animals that pose a direct threat to others. The usual landlord defenses for refusing to provide an accommodation (fundamental alteration and undue hardship) (*see infra* § 8.89) also apply to accommodations related to assistance animals.

Recent changes to the Air Carrier Access Act, 49 U.S.C. § 41705, have affected the use of emotional support animals on commercial airplanes. The U.S. Department of Transportation issued new final rules in the Federal Register on December 10, 2020, 85 Fed. Reg. 79,742, providing that emotional support animals no longer will be considered service animals under the law and allowing airlines to make their own determination whether to allow emotional support animals. Since the changes to the regulations, several major airlines have announced they no longer will allow emotional support animals. Service animals are still required to be allowed on airlines although the new rules allow airlines to require certain documentation.

B. Fair Housing Act [§ 8.82]

1. In General [§ 8.83]

The FHA protects people with disabilities, among other protected classes, from discrimination in housing and housing practices. There is often confusion as to whether an issue arises under the FHA or the ADA; however, the ADA has very little to do with housing and generally only comes into play regarding common areas open to the public such as rental offices and pools or regarding governmental-entity actions such as zoning issues.

2. Coverage [§ 8.84]

The FHA defines *handicap* as a physical or mental impairment that substantially limits one or more major life activities, having a history of such an impairment, or being regarded as having such an impairment. 42 U.S.C. § 3602(h). (This book uses the term "disability.")

The FHA applies to individuals, corporations, associations, and others involved in the provision of housing and residential lending, including property owners, housing managers, homeowners' and condominium associations, lenders, real estate agents, and brokerage services. The FHA does not cover private clubs or religious organizations that restrict occupancy in housing units to members of the club or religious organization. 42 U.S.C. § 3607.

3. Prohibited Discrimination [§ 8.85]

The FHA prohibits discrimination in the sale or rental of housing, in the terms, conditions, or privileges of sale or rental of housing, or in the provision of services or facilities in connection with such housing. A landlord cannot charge higher rents to people with disabilities or charge extra fees or security deposits. For example, charging a higher security deposit to a wheelchair user on the belief that the wheelchair will cause damage to the premises would be prohibited. Also, it is illegal to segregate people with disabilities to a certain building or property. These prohibitions apply whether the discrimination is based on the person with a disability who is buying or renting, a member

of the buyer or renter's household who has a disability, or the buyer or renter's association with a person with a disability. 42 U.S.C. § 3604(f)(1).

In addition, the FHA prohibits coercion, intimidation, or threats that interfere with a person's enjoyment of rights under this law or on account of aiding or encouraging another person in the exercise or enjoyment of rights. 42 U.S.C. § 3617. Therefore, neighbors or other tenants who harass people with disabilities because of their disability violate these provisions. So-called not in my back yard (NIMBY)-type actions are also prohibited. *See, e.g.*, *United States v. Wagner*, 940 F. Supp. 972 (N.D. Tex. 1996) (holding that people who sued to stop sale of home in their neighborhood for use as group home for people with intellectual disabilities intentionally violated this section).

The FHA prohibits landlords from inquiring about a disability or the severity of a disability or to ask questions designed to elicit disability-related information, such as asking whether the tenant is capable of independent living.

At the application phase, a landlord may ask questions related to disability under only two circumstances: (1) if a person with a disability is applying for housing designed or designated for people with a disability, it is legal to ask if the tenant qualifies for such a unit; and (2) if the housing is designated for people with a particular disability, such as an intellectual disability or HIV/AIDS, it is legal to ask whether the prospective tenant qualifies for such a unit. 24 CFR § 100.202(c)(3). In addition, a landlord can ask questions related to disability and the need for accommodations when an accommodation request is made.

4. Reasonable Accommodation [§ 8.86]

The FHA requires housing providers to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person equal opportunity to use and enjoy a dwelling. 42 U.S.C. § 3604(f)(3)(B). The reasonable-accommodation provisions of the FHA apply to most housing providers and agents. The reasonable-accommodation provisions do not apply to (1) a person who owns no more than three homes and sells or rents a home without discriminatory advertising or using a real estate agent; and (2) housing providers that lease units in buildings with four or fewer units, if the owner lives in one of the units. 42 U.S.C. § 3603(b)(1), (2).

An accommodation that may be appropriate for a tenant with a mental illness is to allow the person to have an emotional support animal. For a tenant who has no recent rental history because the person has been in a psychiatric hospital, a reasonable accommodation may be to allow the person to provide a reference from an employer or a social worker instead of a previous landlord. If a landlord has a policy of not renting to anyone with an arrest record, a reasonable accommodation for a tenant with a history of a disorderly conduct arrest may be to waive that requirement if the tenant shows that the conduct was related to a disability, and the person has since undergone treatment and is taking medication. As another example, an accommodation for a person with an intellectual disability might be providing assistance filling out rental application or allowing the tenant to move from a one-bedroom apartment to a two-bedroom apartment to allow for a live-in caregiver.

Accommodations may be requested at any point in the rental relationship.

Example. A tenant who is given a five-day notice to remedy or terminate because the tenant has engaged in hoarding behavior may ask for a reasonable accommodation of allowing time for a cleaning service to assist the tenant with disposing of items or avoid eviction by committing to having cleaning services brought in periodically.

To qualify as a reasonable accommodation, the accommodation must be needed because of a person's disability. In other words, there must be a nexus between the disability-related need and the accommodation requested.

There are no special words that must be used in requesting an accommodation. An accommodation request is made when a person with a disability makes clear that he or she is asking for change or adjustment to a rule, policy, practice, or service because of disability. An individual with a disability may make the request for an accommodation or someone else can make the request on his or her behalf. The request may be made orally or in writing.

If the disability is known to the housing provider and the need for the accommodation is obvious, no further inquiry may be made. If the disability is known to the provider, but the need for the accommodation is not obvious, the housing provider can only request information documenting the need. If the housing provider is not aware of the disability, the housing provider can ask for documentation of the disability and the disability-related need for the accommodation.

In response to a request for a reasonable accommodation, a housing provider may request reliable disability-related information that (1) is necessary to verify that the person meets the definition of "disability," (2) describes the needed accommodation, and (3) shows the

relationship between the person's disability and the need for the requested accommodation. The documentation of the disability may come from the individual herself, Social Security disability determinations, other people familiar with the person with a disability, a doctor or other medical professional, a peer support group, or a service agency. There is usually not a need for medical records or detailed information about the person's disability.

Any costs associated with the provision of an accommodation are usually borne by the housing provider unless they result in an undue financial or administrative burden or fundamentally alter the services provided. See discussion of defenses in section 8.89, *infra*.

The FHA provisions regarding reasonable accommodations can also apply to governmental entities. In *United States v. Village of Marshall*, 787 F. Supp. 872 (W.D. Wis. 1991), the court held that the village violated the FHA by not allowing an accommodation to modify a rule that prohibited the placement of group homes closer than 2,500 feet to one another.

5. Reasonable Modifications [§ 8.87]

In addition to reasonable accommodations, the FHA requires housing providers to allow reasonable modifications to existing premises occupied by a person with a disability when such modifications are necessary to allow the person with a disability equal enjoyment of the property. 42 U.S.C. § 3604(f)(3)(A). Reasonable modifications can include structural changes to interiors and exteriors of dwellings and to common and public use areas.

Common reasonable modifications include such things as the installation of grab bars in bathrooms, widening of doorways for wheelchairs, and adding a ramp to make an entrance accessible. Reasonable modifications are made at the expense of the tenant, and the housing provider may require the tenant to restore the premises to their prior condition (minus reasonable wear and tear) if the modification affects the ability to rent the unit in the future. Widening doorways would not affect a new tenant and would not have to be restored. Removing cabinet doors for ease of access to a sink might affect a new tenant, and, if so, they would have to be restored. The housing provider can require that any modifications be done competently. Modifications done to common and public use areas need not be restored. However, if the housing receives federal financial assistance, structural modifications are considered reasonable accommodations and are paid for by the housing provider.

The process for requesting a reasonable modification and ensuing inquiries by the housing provider are much the same as those outlined above for reasonable accommodations. A request is made either orally or in writing. If the disability is known and the need is apparent, no further inquiry is allowed. If the disability is known, but the need is not apparent, the housing provider can ask for documentation of the nexus between the disability and the requested modification. If neither the disability nor the need for the modification is known, the housing provider can ask for documentation of both.

6. Accessibility Requirements [§ 8.88]

The FHA also added requirements for accessibility in new construction. The new-construction requirements apply to housing units of four or more that were available for first occupancy after March 13, 1991. Among the requirements are that there be at least one accessible entrance on an accessible route, the public and common areas be readily accessible to and usable by people with disabilities, and all doorways be sufficiently wide to allow passage by wheelchair users. In addition, all covered units must have an accessible route into and through the unit; light switches, electrical outlets, and environmental controls must be at accessible heights; bathroom walls must contain reinforcement to allow later installation of grab bars; and kitchens and bathrooms must be set up so that a wheelchair can maneuver in the space. 24 C.F.R. § 100.205. Covered multifamily dwellings are buildings with four or more units if such buildings have one or more elevators and ground-floor units in other buildings consisting of four or more units. 24 C.F.R. § 100.201.

7. Defenses [§ 8.89]

Housing providers are not required to provide reasonable accommodations that would be an undue financial or administrative burden or that would be a fundamental alteration. Courts reviewing reasonable accommodations under the FHA might look to decisions under the Rehabilitation Act and the ADA for guidance because all three laws have similar reasonable-accommodation requirements. *Giebeler v. M&B Assocs.*, 343 F.3d 1143, 1149 (4th Cir. 2003).

Although it might not be an undue financial burden to allow a tenant to pay rent on the third of the month rather than the first because the tenant's Social Security disability check arrives on the third, it would be an undue financial burden for the housing provider to forgo receiving rent altogether. Similarly, it may be a reasonable accommodation to allow a person with mental illness to have an emotional

support animal, but it would be a fundamental alteration to have the on-site property manager care for the dog when the person with mental illness is unable to do so.

The direct-threat defense is also available under the FHA. A landlord is not required to rent to an individual who poses a direct threat to the health and safety of others. 42 U.S.C. § 3604(f)(9). However, a housing provider would be required to consider reasonable accommodations that would minimize or mitigate the risk of a tenant. *See, e.g.*, *Roe v. Housing Auth.*, 909 F. Supp. 814 (D. Colo. 1995) (holding that housing provider was required to show that no reasonable accommodation would eliminate or acceptably minimize risk posed to other tenants by tenant with a mental disability before proceeding with an eviction).

8. Enforcement [§ 8.90]

The FHA is enforced through the filing of an administrative complaint with HUD within one year after the discriminatory act. HUD will conduct an investigation and may attempt to conciliate the case between the parties. Within 100 days after a complaint is filed, HUD is supposed to issue a decision on whether there is reasonable cause to believe discrimination has occurred. If HUD finds reasonable cause, HUD will issue a charge of discrimination. Once a charge of discrimination has been issued, either the complainant or the landlord may choose, within 20 days, to have the case moved to federal court. If the case goes to federal court, the DOJ will represent the complainant. If the case does not go to federal court, HUD attorneys will represent the complainant in a trial before an ALJ. The trial is to be held within 120 days after the charge was issued. 42 U.S.C. § 3612.

Complaining parties also have the option of filing a private lawsuit in federal court within two years after the alleged discriminatory event. There is no obligation to exhaust the administrative process. 42 U.S.C. § 3613.

C. Wisconsin Open Housing Law [§ 8.91]

1. Prohibitions [§ 8.92]

Wisconsin's Open Housing Law, Wis. Stat. § 106.50, prohibits discrimination in housing against people with disabilities as well as other protected classes. The general prohibitions include a wide variety of activities, among them discrimination in selling, renting, construction, advertising, loans, financing, privileges, services, and facilities. It prohibits threatening, coercing, and intimidating and also prohibits actions to induce panic sales. Wis. Stat. § 106.50(2), (2m).

In addition to these prohibitions, the Open Housing Law contains additional protections for people with disabilities. These additional protections include prohibiting segregation or unequal treatment of people with disabilities, in terms of sale or rental or in terms of privileges, services, or facilities, and applies to renters or buyers with disabilities, renters or buyers who have a household member with a disability, and renters or buyers who have an association with a person with a disability. Wis. Stat. § 106.50(2r)(b)1., 2.

The Open Housing Law also contains reasonable-accommodation and reasonable-modification requirements parallel to those in the FHA. Wis. Stat. § 106.50(2r), (3), (4).

2. Distinctions for the FHA [§ 8.93]

The Open Housing Law, unlike the FHA, has very detailed provisions regarding service animals and emotional support animals. Under the FHA, these animals are covered generally under reasonable-accommodation provisions in the statute and guidance from HUD. Under the Open Housing Law, service animals and emotional support animals are not limited to dogs or other domesticated animals. The Open Housing Law spells out which types of documentation can be required and the responsibility to care for the animal, states that additional charges cannot be required, and provides that service animals and emotional support animals need not be allowed if doing so would pose an undue financial or administrative burden or fundamentally alter the nature of the services provided. Additionally, a housing provider need not allow a specific animal that poses a direct threat to a person's health or safety that cannot be reduced or eliminated by another reasonable accommodation or that would cause substantial physical damage to a person's property that cannot be reduced or eliminated by another reasonable accommodation. Wis. Stat. § 106.50(2r)(b)4.(bg)4.

Unlike the FHA, the Open Housing Law has specific penalties for people who intentionally misrepresent that they have a disability or a need for an emotional support animal, and penalties for licensed health-care professionals who misrepresent a patient's disability or the need for an emotional support animal. Wis. Stat. § 106.50(2r)(b)4., (bg)5., 6.

3. Accessibility Requirements under the Open Housing Law [§ 8.94]

The Open Housing Law prohibits discrimination in new construction and remodeling of multifamily dwellings of three or more units (as opposed to FHA coverage of multifamily dwellings of four or more units.) The accessibility requirements are spelled out in Wis. Stat. § 101.132 and are similar to those under the FHA, but, in addition, require lever door handles and plumbing fixtures to be provided at landlord expense upon tenant request. Wis. Stat. § 101.132(2)(a), (4).

The Open Housing Law is enforced through filing of a complaint with the ERD within one year after the alleged discriminatory action. Wis. Stat. § 106.50(6). The ERD will conduct an investigation and will issue a decision on probable cause. The ERD may assist the parties in conciliating the matter. Either party may move the matter to a civil action in circuit court or proceed to an administrative hearing before an ERD ALJ.

If discrimination is found, an ALJ will issue an order for relief as may be appropriate, which may include economic and noneconomic damages suffered by the aggrieved person, regardless of whether the person intervened in the action, and injunctive or other equitable relief. The hearing examiner cannot order punitive damages. Wis. Stat. § 106.50(6)(h). A successful complainant can be awarded costs and attorney fees. Wis. Stat. § 106.50(6)(i). Additionally, the ALJ may order forfeitures against the respondent. Wis. Stat. § 106.50(6)(h).

V. Education [§ 8.95]

A. IDEA and Wis. Stat. Ch. 115 [§ 8.96]

1. In General [§ 8.97]

Education for students with disabilities is addressed at the federal level under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–1482, and its implementing regulations at 34 C.F.R. §§ 300.100–.199 and at the state level in Wis. Stat. §§ 115.758–.90, Students with Disabilities. Wis. Stat. § 115.758 specifically provides that the Wisconsin law is to be construed consistent with the IDEA, and, for practical purposes, the state law mirrors the federal law and the two are discussed together in this section. Laws regarding students and special education are complicated and extensive. This section is meant to be an overview of those laws that are most likely to be relevant for students with mental disabilities. Chapter 9, *infra*, also discusses benefits available to children with various disabilities.

2. Coverage [§ 8.98]

The IDEA covers children between the ages of 3 and 21 who have disabilities and who need special education and related services. One of the pillars of the IDEA is its zero-reject policy, which means no child is too disabled to be provided special education.

Disabilities are broken down into 11 categories: (1) intellectual disabilities, (2) hearing impairments, (3) speech and language impairments, (4) visual impairments, (5) emotional behavior disabilities, (6) orthopedic impairments, (7) autism, (8) traumatic brain injuries, (9) specific learning disabilities, (10) other health impairments, and (11) significant developmental delays. Each category has specific criteria that must be met for meeting the eligibility in that category. Even if a student meets the criteria for one of these categories, there must also be a determination that a student needs special education and related services for the IDEA requirements to apply. (Students with disabilities who do not need special education may be covered under Section 504 of the Rehabilitation Act, discussed in sections 8.109–.113, *infra*.)

3. Child Find [§ 8.99]

School districts, or what the IDEA refers to as local education agencies (LEAs), have an obligation to seek out and identify children with disabilities who reside in their service area. This includes children who attend private schools and children not yet in school. This obligation is known as "Child Find." LEAs must identify, locate, and evaluate all children with disabilities who might need special education and related services. 34 C.F.R. § 300.111.

4. Referral and Evaluation [§ 8.100]

a. Referral [§ 8.101]

The special education journey begins with a referral for evaluation for special education eligibility. A referral for special education may be made by anyone familiar with the child, including parents, doctors, nurses, psychologists, social workers, or administrators of a social

agency who reasonably believe that a child brought to him or her for treatment has a disability. Likewise, licensed professionals employed by an LEA, such as teachers or school psychologists, who reasonably believe a child has a disability must refer that child to the LEA. Wis. Stat. § 115.777. A referral must be in writing and include the name of the child and the reason the referral is being made, and parents must be notified before the referral is made.

b. Evaluation [§ 8.102]

Within 15 business days after receiving a referral, the LEA must send the parent(s) a request to evaluate the child. Wis. Stat. § 115.777. The LEA must notify the parent(s) of any evaluations it intends to conduct and who will be conducting the evaluations. Within 60 days after receiving consent from the parent(s), the LEA must do an evaluation and make a determination if the child is eligible for special education. Wis. Stat. § 115.78(3)(a).

5. Individualized Education Programs [§ 8.103]

a. Individualized Education Program Team [§ 8.104]

The individualized education program (IEP) team at a minimum must include the parent(s) of the child, at least one "regular education" teacher of the child if the child is or may be participating in a regular education environment, at least one special education teacher who has recent training or experience related to the child's known or suspected area of need, and a representative of the LEA who is knowledgeable about the district's resources and has the authority to commit the resources. Wis. Stat. § 115.78. There may be other participants who have knowledge of the child or expertise about the child's disability or need, or who provide related services to the child, such as occupational therapists, physical therapists, or speech and language pathologists. Parents are also free to bring an advocate or attorney to an IEP meeting if they choose to do so. The child may also participate if appropriate.

The IEP team has three main tasks. The first is to determine eligibility or continued eligibility for special education. The team will review records of the student and any testing done as part of an evaluation to determine eligibility. After eligibility is determined, the determination must be reviewed at least once every three years. The second task of the IEP team is to develop the IEP for the student. This plan must be reviewed and updated at least annually. The third task is to determine placement of the child. The student's initial IEP must be drafted and implemented within 90 days after the parent or parents provide consent for evaluation. Wis. Stat. § 115.78(3)(c).

b. IEP [§ 8.105]

The IEP is developed by the team to determine what special education and related services the student needs because of his or her disability. Wis. Stat. § 115.787 describes what is to be included in an IEP. The components of the IEP include the student's present levels of academic achievement and functional achievement. This helps to determine where the plan is starting from and what the student's strengths and weaknesses are. The IEP must contain annual goals and, if the child takes alternative assessments, the goals must include a description of benchmarks or short-term objectives. The IEP must describe how parents will be informed of the student's progress toward these goals, which needs to be at least as often as the parents of regular education students are informed (e.g., in progress reports or report cards). The IEP must identify the special education services and related services, modifications, accommodations, and other services the child might need.

The IEP must explain the extent to which the child will not participate in the regular education classroom with peers without disabilities. The law requires that students with disabilities be educated in the least restrictive environment (LRE). This means that students should be served in the regular education environment with age-appropriate peers to the greatest extent possible and at the school the child would attend if not disabled unless the child's needs cannot be met there.

The IEP must state the beginning date of the services described and include the frequency and duration of the services to be delivered. This includes related services, such as occupational therapy, physical therapy, and speech and language services, but it also includes services a student may need because of mental health. Many schools have a combination of other student services providers (social workers, school psychologists, school counselors, and nurses) who can help with mental health supports in school as well as help families with referrals and connections with community providers.

Many school districts collaborate with local providers to provide school-based mental health services, i.e., providers come to the school and provide on-site services. Families use their insurance, including Medicaid, to pay for the therapy sessions. The Wisconsin Department of Public Instruction (DPI) has grants for districts to initiate school-based mental health services and pay for some of the collaboration time.

The IEP must also address whether the student will participate in statewide assessments and any accommodations that may be necessary for those tests.

For a student who will be 14 or older while the IEP is in effect, transition services must also be addressed. Transition services are designed to help prepare a student for adult life. Depending on the needs of the student, they could include such things as training in daily living skills, mobility training, vocational planning and experiences, and college preparatory courses.

Overall, the IEP must be designed to provide the student with a free appropriate public education (FAPE). 20 U.S.C. § 1401(9). FAPE is one of the key components of the IDEA. It requires that public education be provided at no expense to the parents, that the education meet the state standards, and that it be provided in accordance with the IEP.

The standard for determining FAPE has been discussed by the courts several times over the years. The U.S. Supreme Court first looked at the issue of FAPE in *Board of Education v. Rowley*, 458 U.S. 176 (1982). In that case, Amy Rowley, who was deaf, was making sufficient progress to pass from grade to grade without the assistance of a full-time sign language interpreter. The Court found her rights to FAPE were not being violated. The Court reasoned that Congress's intent in requiring FAPE was to ensure education sufficient to confer "some" educational benefit on the student. *Id.* at 200. The Court viewed the IDEA and its no-reject policy as designed to open the schoolhouse doors to students with disabilities, not to provide them with equal educational opportunity with their peers without disabilities nor to maximize their potential once they were in the door.

Since that time, various courts have attempted to elaborate on the *Rowley* standard. In *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988), the court held that FAPE requires more than a trivial educational benefit. In *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245, 248 (5th Cir. 1997) (citations omitted), the court stated:

> The IDEA guarantees only a "basic floor of opportunity" for every disabled child, consisting of "specialized instruction and related services which are individually designed to provide educational benefit." Nevertheless, the educational benefit to which the Act refers and to which an IEP must be geared cannot be a mere modicum or *de minimis*; rather, an IEP must be "likely to produce progress, not regression or trivial educational advancement."

Most recently, in 2017, the Supreme Court revisited the FAPE standard in *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017), and helped clarify the rights of special education students. Such students are entitled to an education "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 999. The Court rejected that a school district was only obligated to provide educational services to students that offered something more than merely de minimis or trivial progress. However, the Court also rejected the idea that students with disabilities are entitled to educational opportunities that are substantially equal to the opportunities afforded to children without disabilities.

Endrew is an autistic person. His parents argued that the IEP being offered by his school district did not provide him with FAPE. The Supreme Court reviewed its decision in *Rowley*, including some of the inherent conflicts in the decision. The Court neither overruled nor distinguished the earlier decision, but elaborated on it. The decision divided students with disabilities into two groups: those who are educated in regular classrooms with special education supports and services, and those who have more significant needs that limit their ability to make reasonable progress in the general curriculum. *Rowley* involved a student who was progressing smoothly through the regular curriculum; the *Rowley* holding, that for a child fully integrated into the regular classroom an IEP should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade," still stands. The justices appear to believe that for these children, the system itself monitors children's progress by its methods of grading and advancement from grade to grade.

The *Endrew* Court discussed the IDEA's emphasis on specially designed instruction and meeting the child's unique needs. For children whose needs are more complex, the comparison to regular education students passing from grade to grade does not suffice. For students not fully integrated in the regular education classroom, such as Endrew, one needs to look at the child's circumstances. The "educational program has to be appropriately ambitious in light of his circumstances." *Id.* at 1000. "Every child should have the chance to meet challenging objectives." *Id.*

The Court rejected the "merely more than *de minimis*" standard applied by the 10th Circuit, finding that would hardly amount to an education at all and that such a standard would be akin to the problem Congress was trying to address with the IDEA, which, according to the Court and as discussed in the *Rowley* decision, was that many students with disabilities were sitting idly in classrooms, waiting until they were old enough to drop out. *Id.* at 1000–01. The Court held that the IDEA requires "an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 1001.

c. Placement [§ 8.106]

The third job of the IEP team is to determine placement. The educational placement refers to a student's educational environment, including the special education, related services, and supplementary aids and services set out in the student's IEP, the location in which the services will be provided, and the building or facility the child will attend. The rules around placement are set out in the IDEA regulations:

> In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that —
>
> (a) The placement decision—
>
> (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
>
> (2) Is made in conformity with the LRE provisions of this subpart, including [34 C.F.R.] §§ 300.114 through 300.118;
>
> (b) The child's placement—
>
> (1) Is determined at least annually;
>
> (2) Is based on the child's IEP; and
>
> (3) Is as close as possible to the child's home;
>
> (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;
>
> (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
>
> (e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

34 C.F.R. § 300.116.

In Wisconsin, the "group" referred to is the IEP team. The placement is to be determined by a consensus of IEP team members. A school district must have a wide range of special education placements available to meet the needs of students with disabilities. This range includes instruction in regular education classes, with or without modification in the general education curriculum, special classes, special schools, home instruction, and instruction in hospitals and institutions including juvenile justice facilities. 34 C.F.R. § 300.115. Once a placement offer is made, the parent can either consent to the placement and it is implemented, or reject the placement, in which case the school district is not required to provide special education services. A parent can contest the district's placement offer through dispute resolution options discussed in section 8.108, *infra*.

6. Behavior and Discipline [§ 8.107]

For many students with emotional behavior or developmental disabilities, their behavior can sometimes interfere with their learning and the learning of others. When behavior reaches this level, it may be appropriate for the school to conduct a functional behavior assessment (FBA). An FBA is a process to determine (1) the purpose or function of the behavior, (2) the variables that influence the behavior, and (3) components of an effective behavioral intervention plan (BIP). A functional behavior assessment is required when a disciplinary change of placement occurs and the behavior is determined to be a manifestation of the disability, or when an IEP team determines the use of seclusion or restraint is reasonably anticipated. However, an FBA may also be appropriate when challenging behaviors are a concern, the current program is not effective, the student or others are at risk for harm or exclusion, a more restrictive placement or a more intrusive intervention is contemplated, or there are repeated and serious behavior problems.

Data gathered from an FBA is used to design a BIP. A BIP, when necessary, should be developed by the IEP team to address problem behaviors. It should include positive behavioral interventions, not just provide for punishments to the student. It should include a plan on what to do when the problem behavior occurs, and teachers and others who work with the student should have a plan to decrease the problem behaviors and teach alternative behaviors. A BIP should be a living document: It should be reviewed and updated as needed.

Seclusion and restraint are two methods of controlling behavior that are often used with students with disabilities. The use of seclusion and restraint, although not completely prohibited, is limited under Wisconsin law. Wis. Stat. § 118.305.

Seclusion, the involuntary confinement of a pupil, apart from other pupils, in a room or area from which the pupil is physically prevented from leaving, and *physical restraint*, a restriction that immobilizes or reduces the ability of a pupil to freely move his or her torso, arms, legs, or head, are only allowed when "the pupil's behavior presents a clear, present, and imminent risk to the physical safety of the pupil or others and it is the least restrictive intervention feasible." *Id.* Seclusion rooms cannot be locked or be capable of being locked and must be free of objects or fixtures that may injure the student. A student placed in a seclusion room must be supervised in a way that allows the supervisor to see the student at all times, by either being in the room with the student or observing through a window.

Types and duration of physical restraints are also significantly limited, and physical restraint can only be performed by someone properly trained in their use. If a student is subjected to seclusion or restraint, the school must notify the parent within one business day after the incident, prepare a detailed report of the incident within two business days after the incident, and provide the parent with a copy of the written report within three business days.

If a student with a disability is subject to restraint or seclusion in the same school year for a second time, the IEP team is required to reconvene within 10 school days after the incident. The IEP team must review the IEP and revise it if necessary to ensure that the program includes appropriate positive behavioral interventions and supports and other strategies to address the behavior of concern and ensure that the interventions and supports in the IEP are related to the behavior that resulted in seclusion or restraint. These elements should be included as part of a behavior intervention plan.

Students with disabilities can be disciplined for violations of school rules just as students without disabilities are. However, they cannot be disciplined more harshly than students without disabilities. Students with disabilities can be suspended for up to five days in a row. A student can only be suspended for longer than five days if the district sends the parent a notice of expulsion. Wis. Stat. § 120.13(1)(b)2.

Students with disabilities who are suspended for more than 10 consecutive days or who have been suspended in a series of removals for similar behavior totaling 10 days or more in a school year are considered to have experienced a change in placement. This triggers the need for a manifestation determination, discussed below. Included in the 10-day threshold are in-school suspensions if, during the suspension, the student is not continuing to participate in the general curriculum, is not receiving the services specified in the IEP, and does not have the opportunity to participate with nondisabled peers to the extent the student would in the current placement. Also included in the 10-day count are de facto suspensions, i.e., when a child is sent home during the school day because of behavior and the school does not follow suspension procedures.

Within 10 school days after a decision to change a student's placement because of school removals, the parent(s) and relevant members of the IEP team must meet and determine whether the student's behavior is a manifestation of the student's disability. Behavior is determined to be a manifestation of a student's disability if the conduct in question was caused by or had a direct and substantial relationship to the student's disability, or the conduct in question was a direct result of the LEA's failure to implement the student's IEP, including behavior intervention plans. In reviewing whether behavior is a manifestation of a student's disability, the team must review all relevant information in the student's file, including the student's IEP, prior behavior incidents, any teacher observations, and any additional relevant information provided by the parents. Additional information may include reports or opinions from outside therapists or others who work with the student in the community. This is not an exhaustive list; any relevant information can be considered.

If the team determines that the behavior was a manifestation of the student's disability, either because the behavior was caused by or had a direct and substantial relationship to the student's disability or because the IEP was not being properly implemented, the IEP team must return the child to the placement from which the student was removed, unless the parent and the district agree to a change in placement as part of changes to the behavior intervention plan. If a manifestation is found and the student already has a BIP, the IEP team must meet to review the plan and its implementation. The team should make any necessary modifications to the plan. If the student does not have a BIP, the team must conduct a functional behavior assessment and implement a BIP for the student.

If the behavior is found not to be to a manifestation of the student's disability, the district may remove the student to the same extent it would remove a student without a disability.

Special rules apply if a student's behavior involves weapons, illegal drugs, controlled substances, or serious bodily injury. In those situations, a student may be removed to an interim alternative educational setting for up to 45 school days without regard to whether the behavior is determined to be a manifestation.

Students whose behavior has not been found to be a manifestation of their disability may be expelled in the same manner as students without disabilities. As mentioned above, students whose behavior is found to be a manifestation of their disability cannot be expelled for that behavior even if a student without disabilities might be expelled for the same behavior.

Students with disabilities who are expelled are still entitled to receive FAPE. A district that expels a student with an IEP must still continue to provide services to that student that enable the student to continue to participate in the general education curriculum and make progress toward meeting IEP goals. These services, however, may be delivered in another setting. This often means they are provided in "alternative" schools or delivered at public library.

Practice Tip. The manifestation determination review is a very significant meeting, and the outcome can make a major difference in what happens to the student's education. Often parents are not aware of the significance and are not prepared to adequately discuss the

connection between the disability and the behavior. They should be encouraged to enlist the advice of outside therapists, social workers, or others who have knowledge of the child's disability.

7. Dispute Resolution [§ 8.108]

When parents or adult students disagree with the decisions or practice of a school district, there are several avenues of recourse. Sometimes more than one avenue of recourse may be pursued.

Wisconsin has a strong mediation system that can provide assistance with either mediation or facilitated IEP meetings. The Wisconsin Special Education Mediation System (WSEMS) provides the services of trained mediators and facilitators statewide to parents and schools at no cost to the recipients.

1. *Facilitated IEP meetings.* If parents or school district staff members anticipate a difficult IEP meeting, they can request that a facilitator be appointed for the meeting. Facilitation is designed for conflict prevention. The role of the facilitator is not to arbitrate the dispute but to keep the IEP team focused and to ensure that everyone at the table has the opportunity to be heard. Such a facilitator can be helpful in keeping the process moving and not let the parties get too bogged down on one issue or concern. Facilitated IEP meetings are scheduled for not more than three hours. Both parties must agree to the facilitation, and the requirements regarding IEP team member participation apply.

2. *Special education mediation.* The IDEA mandates that all states offer mediation to parents and local education agencies as a voluntary initial process for the resolution of special education disputes. Wis. Stat. § 115.797 also mandates that Wisconsin offer mediation as an option. The WSEMS is that system.

   The WSEMS provides trained neutrals to parents and school districts for mediation, IEP facilitation, and resolution process services. WSEMS services are free, private, and confidential. Mediation can be used when any dispute arises, not just a claim for due process. But parties are able to use the mediation process in place of the required resolution process (see discussion below).

   Parties need to be clear that "stay-put" does not apply just because a parent has requested mediation. The IDEA's stay-put provision states that a student must remain in the "current educational placement" while a special education dispute is pending, unless the parents and the educational agency agree otherwise. 34 C.F.R. § 300.518(a). But this applies only when a due-process proceeding is pending, so mediation alone does not invoke stay-put. Mediation cannot be used to delay or deny a parent's right to a due-process proceeding. 34 C.F.R. § 300.506(b)(1)(ii).

   In addition to issues that are the subject of a pending due-process request, mediation can cover broader issues, including underlying interests and emotions. Mediation is about conflict resolution and helping the parties agree on how they want to resolve the issues. Sometimes this resolution can be much different and more creative than what an ALJ would be able to do in a due-process decision.

   Like facilitated IEPs, both parties have to agree to participate in mediation. It is a confidential process, and discussions in mediation cannot be raised in a due-process hearing. State law provides that the participants in the mediation must be the child's parents and two people from the school district. However, parties can agree to have others present including advocates or attorneys, but this should be worked out ahead of time.

   Successful mediations result in a written agreement describing what has been agreed to. Both parties sign this agreement, and it becomes a contract between the parents and the district. It is enforceable in any state or federal court of competent jurisdiction. 34 C.F.R. § 300.506(b)(7).

3. *IDEA complaints.* Another avenue of recourse parents have is to file a special education complaint with the DPI. These complaints are generally based on procedural violations rather than substantive disputes, but substantive issues can be raised and will be addressed if there are not significant factual disputes. A model form for a complaint is available on the DPI website, but the model form need not be used. Complaints must be in writing and must be signed. They also must include demographic information, the facts on which an allegation that special education law has been violated are based, and the proposed or desired resolution of the issue.

   The DPI will conduct an investigation, which includes asking for a position and documentation from the school district. Unless there are extenuating circumstances, the DPI will issue a decision within 60 days after the filing of the complaint. If the DPI finds there has been a violation, it will require the district to develop a corrective action plan to remedy the problem.

This method of complaint is relatively easy for parents to handle on their own and does not involve the time, expense, and complicated procedures of a due-process complaint.

4. *Due-process complaints.* Due-process hearings are the most formal of the available types of dispute resolution. Due-process complaints are filed with the DPI and carried out through the Office of Hearings and Appeals. They must be filed within one year after the issue or event that is the basis for the complaint. Exhaustion of administrative remedies must occur before an IDEA case can be brought in federal court. Due process is an appropriate remedy for resolving issues related to (a) identification of disability, (b) evaluation, (c) placement, and (d) the provision of FAPE.

Generally, due-process actions are brought by parents on behalf of their children. However, school districts can also commence due-process proceedings to override a parent's refusal to grant consent for an initial evaluation, a reevaluation, or an initial educational placement or to contest the payment of an independent educational evaluation. Wis. Stat. § 115.80(1)(b). In addition, if a district wants to place a child who it believes is a threat of injury to themselves or others in an interim alternative educational setting based on conduct that was determined to be a manifestation of the child's disability, the district can seek an expedited due-process hearing to order that placement. 34 C.F.R. § 300.532(c).

IDEA provides that only issues raised in the complaint are subject to the due-process proceeding.

Within 15 calendar days after receiving notice of the parent's due-process complaint, the district must schedule a resolution meeting. A resolution meeting is not required when the school district is the complaining party.

The resolution meeting is a mandatory process that was included in the most recent IDEA reauthorization in hopes of minimizing the need for the more costly and time-consuming due-process hearing. 34 C.F.R. § 300.510. The resolution meeting includes the parents and the relevant members of the IEP team who have specific knowledge of the facts identified in the complaint. This is not necessarily the entire IEP team. The district must have someone who has decision-making authority on behalf of the district. School districts cannot bring their lawyer to the resolution meeting unless the parent is also accompanied by a lawyer. 34 C.F.R. § 300.510(a)(1)(ii). There is no provision that permits the waiver of this restriction. The 15-day timeline also applies under expedited due-process procedures and runs concurrently with the 20-day timeline for hearing under those provisions.

The burden is on the school district to convene the resolution meeting. If the district is unable to obtain the parent's participation after diligent, documented efforts to do so, at the end of the 30-day resolution period, the district can ask the hearing officer to dismiss the complaint. While a parent's active participation in the resolution meeting is required, the parent is not required to agree to the district's proposed resolution.

If the parties do reach resolution of the dispute, they must execute a written agreement that is signed by both parties, including a district representative who has authority to bind the district. The agreement must be enforceable in state or federal court or by the state education agency if the state has other procedures for the enforcement of resolution agreements. 34 C.F.R. § 300.510(d). Either party can void the agreement within three business days after the agreement's execution. 34 C.F.R. § 300.510(e).

If the parties do not reach a resolution within 30 days after the notice of the due-process complaint, the 45-day due-process time limit begins to run. This requires that a hearing be held, and a written decision be issued, within 45 days. 34 C.F.R. § 300.510(b).

The district is not required to have a resolution session if either the parents and the district agree in writing to waive the meeting or the parties agree to use the mediation process. The resolution period is shortened if both parties agree in writing to waive the resolution meeting. The signing of the waiver causes the 45-day due-process timeline to commence. If both parties agree to continue the mediation at the end of the 30-day resolution period but one of the parties later withdraws from the mediation process, the 45-day timeline starts to run the day after the withdrawal. 34 C.F.R. § 300.510(c)(3).

As part of filing for a due-process hearing, a parent can invoke the right to a stay-put placement for their child. Stay-put is automatic and does not require further action by the hearing officer. The educational placement can be changed during the proceedings only with the parties' agreement.

The IDEA neither provides for nor prohibits discovery. For most purposes, though, because of the relatively short timelines for due-process hearings, traditional discovery is not practical. A hearing officer does have the authority to issue and enforce subpoenas. Wis. Stat. § 115.80(5).

It is generally the practice of the hearing officers, who in Wisconsin are employed by the Division of Hearings and Appeals, to conduct a scheduling conference. At this conference, the hearing officer will set a date(s) for hearing, clarify any issues for decision, and set deadlines for exchange of exhibits and witness lists.

The IDEA provides that all evidence to be used at a hearing must be provided to the other party at least five business days before the hearing. 34 C.F.R. § 300.512(a)(3). Generally, parties are required to identify the names and addresses of witnesses, the affiliations of the witnesses, and the general subject matter to be covered by any expert witnesses. In addition, under the same five-day rule, the parties must exchange copies of all exhibits including evaluation and recommendations that have been completed by that date to be offered at the hearing.

Hearing officers have some discretion as to enforcing the five-day rule. They can either prohibit the introduction of evidence that was not disclosed pursuant to the rule or in limited circumstances they can grant the non-disclosing party a continuance. 34 C.F.R. § 300.512(b)(2); *see also* Letter to Steinke, 18 IDELR 739 (Off. of Special Educ. Programs 1992). (To obtain a copy of this letter or other documents issued before 2001, go to U.S. Dep't of Educ., *OSEP Policy Documents*, https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/index.html (last modified Aug. 26, 2020), and see the instructions in the Policy Letters paragraph.)

Parties have the right to be accompanied by counsel at due-process hearings, 34 C.F.R. § 300.512(a)(1), and the IDEA further allows states to decide whether parties have the right to be represented by nonattorney advocates at due-process hearings, *id*. This is allowed in Wisconsin.

Parents have the right to receive, at no cost, a written or an electronic verbatim record of the hearing and of the findings of fact and decision.

Hearings must be conducted at a time and a place that are reasonably convenient to the parties and the child involved. 34 C.F.R. § 300.515(d).

Both parties have the right to present evidence, confront and cross-examine, and compel the attendance of witnesses. The hearing officer may administer oaths and affirmations, issue and enforce subpoenas, and regulate the course of the hearing. The hearing officer need not follow the rules of evidence and can admit all testimony having reasonable probative value but must exclude immaterial, irrelevant, or unduly repetitious testimony. Wis. Stat. § 115.80(3), (5).

The burden of persuasion in a due-process hearing generally falls on the moving party. This is almost always the parent(s). In *Schaffer v. Weast*, 546 U.S. 49 (2005), the U.S. Supreme Court held that the burden of persuasion in proving the effectiveness of a student's IEP is allocated to the party challenging it. The challenging party must provide sufficient information to show the IEP does not adequately address the student's needs. However, both parties should present evidence. Failure to do so may cause a party to lose, even if the burden of persuasion was on the other party.

In *Hansen v. Republic R-III School District*, 632 F.3d 1024 (8th Cir. 2011), a student's parents challenged the district's decision to deny special education eligibility for the student, who had been diagnosed with attention deficit hyperactivity disorder (ADHD), conduct disorder, and bipolar disorder. The parents offered evidence of these conditions, their son's numerous suspensions for behavioral issues, and his consistently poor academic performance and on standardized tests. The district did not offer any evidence and simply argued that the student did not meet the statutory definition of a child with a disability. Although initially successful with the due-process panel, the district lost on appeal in federal court and in the federal court of appeals, with the court concluding that the student was eligible for services both as a student with an emotional disturbance and as a student with another heath impairment (ADHD). The district's failure to cite any evidence in the record supporting its conclusion that ADHD does not adversely affect the student's educational performance was a factor in the court's decision.

If both parties are represented by counsel, the hearing officer may allow them to submit their closing arguments via written legal brief, the scheduling of which is at the discretion of the hearing officer. However, the 45-day timeline from the close of the resolution period is controlling unless one or both of the parties agree to an extension. The hearing officer cannot unilaterally extend the timeline. The extension must be for a specified amount of time and cannot be indefinite. If a hearing officer grants an extension of time, the hearing officer must refer to the extension and the reason for the extension in the record of the proceedings. Wis. Stat. § 115.80(6).

Due-process hearing decisions must be in writing, consist of findings of fact and conclusions of law, and be based on a preponderance of the evidence. The findings of fact must be based solely on the evidence received at the hearing. Wis. Stat. § 115.80(5). A hearing officer has

the authority to issue a decision consistent with Wisconsin law and the IDEA and to order whatever remedy is reasonably necessary to bring the parties into compliance with the law.

A school district should implement a hearing officer's decision within a reasonable period of time and without undue delay, based on whether the district plans to appeal and the difficulty of implementing the relief. There should be little delay if the hearing officer orders reimbursement or compensatory education. If the decision requires the district to take significant action, such as training its entire staff to meet the child's needs or create extensive renovations, however, the district might need additional time. Letter to Voigt, 64 IDELR 220 (Off. of Special Educ. Programs 2014), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/acc-11-020700r-pa-voigt-dueprocesshearingdecisions.pdf.

Wisconsin has a one-tier system, so appeals of a due-process hearing officer decision go either to circuit court in the county in which the child resides or to a U.S. district court. Appeals must be filed within 45 days after service of the decision of the hearing officer. The court will receive the records of the administrative proceeding, take additional evidence at the request of a party, and, basing its decision on preponderance of the evidence, grant such relief as the court determines is appropriate. Wis. Stat. § 115.80(7); 34 C.F.R. § 300.516(c).

B. Section 504 of the Rehabilitation Act and ADA in Schools [§ 8.109]

1. In General [§ 8.110]

While the IDEA and Wisconsin special education law have the most effect on students with disabilities in schools, two other laws have significant effect on the civil rights of students with disabilities. Title II of the ADA and Section 504 of the Rehabilitation Act [hereinafter Section 504], which the ADA was based on, also provide protections. Title II, as discussed above, applies to all governmental entities including public schools, and Section 504 applies to all programs receiving federal funds, which most public schools do.

2. Preschool, Elementary, and Secondary Education [§ 8.111]

Students with disabilities who do not need special education may still need reasonable accommodations. For a student in that situation, a 504 plan should be developed. The 504 plan development process is similar to the IDEA program development process, although not quite as rigid. However, despite the similarities between the IDEA and Section 504, Section 504 is a regular education obligation and responsibility. It is not a special education obligation.

A district has an obligation to locate children with disabilities, similar to the child-find obligations under the IDEA. 45 C.F.R. § 84.32. A student should be evaluated for a 504 plan when there is reason to believe that he or she may have a disability. Like IDEA evaluations, Section 504 evaluations require parental consent. Evaluations must be completed in a reasonable amount of time and include standardized testing by a qualified evaluator. 45 C.F.R. § 84.35. Because of the similarity of requirements, many districts use the IDEA evaluation procedures, and once it is determined that the student does not require special education services, school districts will turn to developing a 504 plan.

The evaluation team will decide whether the student has a physical or mental impairment that limits a major life activity. Section 504 does not require that parents be a part of that team. If the student does meet the criteria, the next thing to determine is whether the student needs modifications to fully access the educational experience. Needed modifications could take many forms and must be determined on an individualized basis. Physical modifications such as ramps or lifts may be needed. Providing assistive technology or other supports may be needed. Related services such as audio books or sign language interpreters may be required. Students with disabilities must be provided with an equal opportunity to participate in all areas of the academic experience, including nonacademic services and extracurricular activities, such as counseling services, recreational athletics, health services, recreational activities, and special interest groups or clubs.

504 plans must provide a free and appropriate public education, which in this context is defined as the provision of regular or special education and related aids and services that are designed to meet individual educational needs of student with disabilities as adequately as the needs of students without disabilities are met. 45 C.F.R. § 84.33.

Section 504 also has some of the same disciplinary protections as the IDEA. Students with disabilities who are suspended for 10 or more days or who are facing expulsion are to be provided with a manifestation determination as outlined in section 8.107, *supra*. If the behavior is found to be a manifestation of the disability, the student's placement does not change. If the behavior is found not to be a manifestation of the student's disability, the student can be disciplined in the same manner as students without disabilities. If a student with a 504 plan is expelled, the district is not obligated to provide any continuing services.

A school district's obligations under Section 504 are to refrain from discrimination against people with disabilities and to provide modifications, which also apply to staff with disabilities and people with disabilities who may visit the school such as parents.

Practice Tip. A 504 plan may be useful for students with mental health disabilities. They may not need special education but because of limitations caused by the disability may need modifications to fully access their education.

3. Colleges and Universities [§ 8.112]

The nondiscrimination provisions of the ADA and Section 504 of the Rehabilitation Act also apply to colleges and universities. 45 C.F.R. § 84.41. Colleges and universities cannot discriminate in admissions and recruitment, 45 C.F.R. § 84.42, treatment of students, 45 C.F.R. § 84.43, housing, 45 C.F.R. § 84.45, or financial and employment assistance to students, 45 C.F.R. § 84.46. In addition, they may be required to provide auxiliary aids and make academic adjustments and modifications. "Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted." 45 C.F.R. § 84.44.

4. Enforcement [§ 8.113]

Schools must have a grievance procedure for complaints of Section 504 obligations not being followed. They must have a Section 504 coordinator who is responsible for developing and handling the grievance procedure.

An additional avenue open to people with disabilities, including staff, parents, and students when they feel their rights have been violated by a school district, is to file a complaint with the U.S. Department of Education's Office for Civil Rights (OCR). The complaints that are most appropriate for this route are those alleging violations of Section 504 of the Rehabilitation Act and Title II of the ADA.

Complaints must be filed directly with the OCR within 180 days after the infraction. The OCR will do an initial screening for merit and, if appropriate, the OCR will begin an investigation. The OCR may ask for documents, and, if necessary, interview school officials, and conduct an onsite visit. The OCR will first seek early complaint resolution between the parties. If they proceed with a formal investigation, there is little role for the parents and students. It becomes a matter between the OCR and the school district. If the OCR finds a violation, then (1) a letter of finding is issued and (2) a monitored written agreement is made with the school. If a school district refuses to comply with an OCR ruling, the OCR may either (1) begin procedures to terminate federal funding, or (2) refer the matter to the DOJ for enforcement.

C. Bullying and Harassment [§ 8.114]

1. Federal Law [§ 8.115]

Bullying and harassment can result in the denial of FAPE under the IDEA and are forms of disability discrimination under Section 504 of the Rehabilitation Act of 1973 and Title II of the ADA. Both the OCR and the DOJ consider bullying a form of harassment when the bullying is based on a student's disability. This behavior can include name calling, nonverbal behavior, physical harm, threatening, or humiliation. It is not unusual for students with disabilities to be bullied or harassed because of their disability.

2. Wisconsin Law [§ 8.116]

Wisconsin law also prohibits disability discrimination, including harassment and bullying.

Pupil discrimination prohibited:

(1) Except as provided in s. 120.13 (37m), no person may be denied admission to any public school or be denied participation in, be denied the benefits of or be discriminated against in any curricular, extracurricular, pupil services, recreational or other program or activity because of the person's … physical, mental, emotional or learning disability.
(2)(a) Each school board shall develop written policies and procedures to implement this section and submit them to the state superintendent as a part of its 1986 annual report under s. 120.18. The policies and procedures shall provide for receiving and investigating complaints by residents of the school district regarding possible violations of this section, for making determinations as to whether this section has been violated and for ensuring compliance with this section.
(b) Any person who receives a negative determination under par. (a) may appeal the determination to the state superintendent.

Wis. Stat. § 118.13.

3. School District Liability [§ 8.117]

School districts and their staff are legally obligated to respond to allegations of disability discrimination and investigate and prevent disability harassment. If disability harassment limits or denies a student's ability to access the student's education, this may be a denial of FAPE. Bullying and harassment deny FAPE if they are severe, pervasive, or persistent. Harassment of a student based on disability may decrease the student's ability to benefit from his or her education thus amounting to a denial of FAPE. Dear Colleague Letter, 111 LRP 45106 (2000).

School district liability for the harassment of students by other students was established by the U.S. Supreme Court in *Davis v Monroe County Board of Education*, 526 U.S. 629 (1999). *Davis* involved sexual harassment by one student toward another student (Davis) that repeatedly was brought to the school district's attention. Davis sued, alleging the indifference by the defendants to the unwelcome sexual advances created an intimidating, hostile, offensive, and abusive school environment in violation of Title IX.

The Supreme Court took this case to resolve "whether, and under what circumstances, a recipient of federal educational funds can be liable in a private damages action arising from student-on-student sexual harassment." *Id.* at 637. The Court concluded that because Title IX functions as a spending power, recipients of federal funds cannot be held liable for the actions of a third party unless Congress expressly has allowed for this type of liability. In this case, however, Davis was not attempting to hold the board responsible for the student's misconduct; rather, Davis was attempting to hold the board responsible for the board's decision. *Id.* at 640. When misconduct takes place on school grounds, the school is in a position to control the harassment. The harasser does not need to be an agent for the district to be liable, but the conduct must be severe, pervasive, and objectively offensive, such that it deprives victims of access to the education benefits of school, and the school must be deliberately indifferent. *Id.* at 642.

The standards laid out in *Davis* were applied to peer-to-peer disability harassment in *Werth v. Board of Directors*, 472 F. Supp. 2d 1113 (E.D. Wis. 2007). Although the court did not find the standards met there, the court did accept that such harassment could be a violation of Section 504 and the ADA.

Since *Davis*, at least three federal courts have found that an inadequate response to peer-to-peer disability discrimination is actionable under Section 504, the ADA, or both. *M.P. v. Independent Sch. Dist. No. 721*, 326 F.3d 975 (8th Cir. 2003); *K.M. v. Hyde Park Cent. Sch. Dist.*, 381 F. Supp. 2d 343, 358–60 (S.D.N.Y. 2005); *Biggs v. Board of Educ.*, 229 F. Supp. 2d 437 (D. Md. 2002). The Eighth Circuit in *M.P.* did not discuss *Davis* but used the general prima facie case standard for a case of disability discrimination under Section 504: The plaintiff must be (1) a qualified individual with a disability, (2) denied the benefits of a program or activity of a public entity receiving federal funds, and (3) discriminated against on the basis of the disability. *M.P.*, 326 F.3d at 981–82.

The two federal district courts analyzed the peer-to-peer Section 504 and ADA claims in light of *Davis* and found the elements of such claims to be the following: (1) The plaintiff is an individual with a disability, (2) he or she was harassed based on that disability, (3) the harassment was sufficiently severe or pervasive that it altered the condition of the plaintiff's education and created an abusive educational environment, (4) the defendant knew about the harassment, and (5) the defendant was deliberately indifferent to the harassment. *Biggs*, 229 F. Supp. 2d at 444–45; *see K.M.*, 381 F. Supp. 2d at 359, 360–61.

While pursuing claims of violation of the IDEA based on disability harassment and discrimination resulting in a denial of FAPE does require an exhaustion of administrative remedies, no such exhaustion is required to pursue Section 504 and ADA claims that are unrelated to the provision of FAPE. Thus, the parents of a student with disabilities could pursue Section 504 and ADA claims based on disability harassment despite having previously settled their IDEA claims. *R.P. v. Springdale Sch. Dist.*, 47 IDELR 128 (W.D. Ark. 2007).

4. Preventing Bullying [§ 8.118]

Wisconsin passed an anti-bullying law in 2010 that required the DPI and school districts to develop policies regarding bullying. Unfortunately, the law does not contain any penalties for bullying or remedies for those who have been bullied. Wis. Stat. § 118.46. Every school district in Wisconsin should have anti-bullying policies, procedures for investigating allegations of bullying, and disciplinary policies for those who engage in bullying. See chapter 9, *infra*, for additional discussion of bullying.

VI. Additional Resources [§ 8.119]

A. Employment [§ 8.120]

Guidance

Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA (Oct. 17, 2002), ADA, Rehabilitation Act, 29 C.F.R. pt. 1630, 29 C.F.R. pt. 1614, https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada

- The U.S. Equal Employment Opportunity Commission (EEOC) issued this resource to address the rights and responsibilities of employers and individuals with disabilities regarding reasonable accommodation and undue hardship under Title I of the ADA.

Title I Technical Assistance Manual Addendum (Jan. 1, 2002), ADA, Rehabilitation Act, 29 C.F.R. pt. 1630, https://www.eeoc.gov/laws/guidance/title-i-technical-assistance-manual-addendum.

- The EEOC issued this addendum as an update to the *Technical Assistance Manual* to discuss three U.S. Supreme Court rulings from 1999 to 2002 regarding disability discrimination provisions under Title I of the ADA.

Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA (July 27, 2000), ADA, Rehabilitation Act, 29 C.F.R. pt. 1630, 29 C.F.R. pt. 1614, https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees.

- The EEOC issued this guidance to discuss when it is permissible for employers under Title I of the ADA to ask disability-related questions or require medical examinations of employees.

Questions and Answers: Enforcement Guidance on Disability-Related Inquiries and Medical Examinations Under the Americans with Disabilities Act (July 27, 2000), ADA, Rehabilitation Act, 29 C.F.R. pt. 1630, https://www.eeoc.gov/laws/guidance/questions-and-answers-enforcement-guidance-disability-related-inquiries-and-medical.

- This EEOC guidance explains when employers can and cannot obtain medical information from their employees under the ADA.

Enforcement Guidance on the ADA and Psychiatric Disabilities (Mar. 25, 1997), ADA, Rehabilitation Act, 29 C.F.R. pt. 1630, 29 C.F.R. pt. 1614, https://www.eeoc.gov/laws/guidance/enforcement-guidance-ada-and-psychiatric-disabilities.

- This EEOC guidance discusses employment discrimination and the rights and responsibilities of employers of individuals with psychiatric disabilities under Title I of the ADA.

Reference

Job Accommodation Network (JAN) Home Page, https://askjan.org (last visited June 14, 2021).

- JAN is an expansive resource for guidance on workplace accommodations and disability employment issues for both employee and employer.

Complaint Filing

EEOC, *How to File a Charge of Employment Discrimination*, https://www.eeoc.gov/how-file-charge-employment-discrimination (last visited June 14, 2021).

- Information on how to file an employment discrimination complaint with the EEOC.

DWD, *Discrimination Complaint – Fair Employment*, https://dwd.wisconsin.gov/dwd/forms/erd/erd-4206-e.htm.

- This is a link to the form to be used to file a fair employment complaint.

B. Community Living [§ 8.121]

Guidance

U.S. DOJ, C.R. Div., *ADA: Know Your Rights, Returning Service Members with Disabilities*, ADA.gov (Jan. 2010), https://www.ada.gov/servicemembers_adainfo.html.

- This resource explains the rights of disabled military veterans under the ADA.

The Americans with Disabilities Act, Title II Technical Assistance Manual Covering State and Local Government Programs and Services, https://www.ada.gov/taman2.html (last visited June 14, 2021).

- This manual details ADA requirements for both state and local governments under Title II.

U.S. DOJ, C.R. Div., *Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and* Olmstead v. L.C. (last updated Feb. 25, 2020), https://www.ada.gov/olmstead/q&a_olmstead.htm.

- This is a technical assistance guide drafted by the Department of Justice to "assist individuals in understanding their rights under Title II of the ADA and its integration mandate," "to assist state and local governments in complying with the ADA," and to stress the importance of enforcement of the *Olmstead* case.

ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities, https://www.ada.gov/taman3.html (last visited June 14, 2021).

- This manual details ADA requirements for public accommodations, commercial facilities, and private entities offering certain examinations and courses under Title III.

Complaint Filing

U.S. DOJ, C.R. Div., *How to File an Americans with Disabilities Act Complaint with the U.S. Department of Justice*, https://www.ada.gov/filing_complaint.htm (last visited June 14, 2021).

- Information on how to file an ADA complaint with the Department of Justice.

Discrimination Complaint – Public Accommodation or Amusement, DWD.Wisconsin.gov, https://dwd.wisconsin.gov/dwd/forms/erd/erd-10241-e.htm. This is the link containing the form to be used to file a public accommodation or amusement complaint.

C. Service Animals [§ 8.122]

U.S. DOJ, C.R. Div., *ADA Requirements: Service Animals* (July 12, 2011), https://www.ada.gov/service_animals_2010.htm (last updated Feb. 24, 2020).

- The DOJ issued this publication to provide guidance on the term "service animal" and further explain service animal provisions in the ADA.

U.S. DOJ, C.R. Div., *Frequently Asked Questions about Service Animals and the ADA* (July 2015), https://www.ada.gov/regs2010/service_animal_qa.html.

- An ADA-compiled list of questions and answers about how the ADA applies to service animals.

D. Housing [§ 8.123]

U.S. DOJ & U.S. HUD, *Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Modifications under the Fair Housing* Act (Mar. 5, 2008), https://www.hud.gov/sites/documents/reasonable_modifications_mar08.pdf.

- This statement provides further information regarding the rights and obligations of people with disabilities and housing providers relating to reasonable modifications under the Fair Housing Act.

U.S. DOJ & U.S. HUD, *Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Modifications under the Fair Housing Act* (May 17, 2004), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf.

- This statement provides further information regarding the rights and obligations of people with disabilities and housing providers relating to reasonable modifications under the Fair Housing Act.

U.S. Access Board, *About the ADA Accessibility Standards*, https://www.access-board.gov/guidelines-and-standards/buildings-and-sites/about-the-ada-standards (last visited June 14, 2021).

- Guidelines for accessibility per the ADA.

U.S. HUD, *Assessing a Person's Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act* (Jan. 28, 2020), https://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf?utm_medium=email&utm_source=govdelivery.

- This notice explains the obligations of landlords and housing providers under the Fair Housing Act regarding service animals as reasonable accommodations for people with disabilities.

Reference

Judge David L. Bazelon Ctr. for Mental Health Law, *Housing Overview and Resources*, http://www.bazelon.org/our-work/mental-health-systems/housing/ (last visited June 14, 2021).

- The Bazelon Center for Mental Health Law has compiled several resources at this website for individuals with mental disabilities seeking affordable and accessible housing under the Fair Housing Act.

Judge David L. Bazelon Ctr. for Mental Health Law, *What Fair Housing Means for People with Disabilities* (last updated April 2018), https://secureservercdn.net/198.71.233.254/d25.2ac.myftpupload.com/wp-content/uploads/2018/05/Fair-Housing-Guide_2018-Update.pdf.

- This resource discusses housing discrimination of people with disabilities, from application to tenancy, reasonable accommodations, and accessibility.

Complaint Filing

Wis. DWD, *Wisconsin's Fair Housing Law & Complaint Proces*s, https://dwd.wisconsin.gov/er/civilrights/housing/complaintprocess.htm and https://dwd.wisconsin.gov/dwd/forms/erd/erd-10240.htm

- Information on Wisconsin Fair Housing laws and filing a complaint.

U.S. HUD, *File a Complaint*, https://www.hud.gov/program_offices/fair_housing_equal_opp/online-complaint.

- Information on filing a housing discrimination complaint with U.S. Department of Housing and Urban Development (HUD).

E. Education [§ 8.124]

Guidance

Wis. DPI, Information Update Bull. 06.02 (Oct. 2006).

- This bulletin discusses Wisconsin legal requirements relating to disciplining children with disabilities.

Wis. DPI, Information Update Bull. 07.01 (Feb. 2007).

- This bulletin addresses behavioral needs of students with disabilities and the responsibilities of special education programs and local education agencies to address such needs.

Wis. DPI, Information Update Bull. 10.07 (Oct. 2010).

- A description of special education services, modifications, and supports in individualized education programs (IEPs).

Wis. DPI, Information Update Bull. 14.02 (Dec. 2014).

- An explanation of the manifestation determination process for students with disabilities.

Wis. DPI, Information Update Bull. 18.02 (June 2018).

- This bulletin explains what it means to provide a free appropriate public education (FAPE), as set forth in the Supreme Court case *Endrew F. v. Douglas County School District*.

Wis. DPI, *Answers to Frequently Asked School Discipline Questions* (Jan. 2012), https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/schldscplnqa.pdf.

- This document explains the rights and responsibilities related to school discipline in Wisconsin public schools.

Reference

Wis. DPI, *Special Education in Plain Language*, https://dpi.wi.gov/sites/default/files/imce/sped/pdf/spec-ed-plain-lang-english.pdf.

- A Wisconsin-specific handbook on special education laws, policies, and practices.

Wis. DPI, *The Wisconsin School Mental Health Framework* (Dec. 2015), https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/mhframework.pdf.

- Information on recommended comprehensive school mental health systems in Wisconsin schools and school districts.

Wis. DPI, *School Mental Health*, https://dpi.wi.gov/sspw/mental-health.

- This contains many different resources on school mental health, including resources on youth suicide prevention and trauma-sensitive schools:
  - Youth Suicide Prevention: https://dpi.wi.gov/sspw/mental-health/youth-suicide-prevention
  - Trauma Sensitive Schools: https://dpi.wi.gov/sspw/mental-health/trauma

Coalition for Expanding School-Based Mental Health in Wisconsin, https://www.schoolmentalhealthwisconsin.org.

- The Coalition advances and supports "expanded, comprehensive, and integrated mental health services within the school setting through school, home, and community partnerships." The Coalition engages in and organizes many different activities to support their mission.

Wis. DPI, *A Comprehensive Approach to Bullying Prevention*, https://dpi.wi.gov/sspw/safe-schools/bullying-prevention.

- Wisconsin DPI's anti-bullying curriculum.

PACER's National Bullying Prevention Center, https://www.pacer.org/bullying/.

- PACER provides numerous resources to prevent childhood bullying.

Complaint Filing

Wis. DPI, *IDEA State Complaints*, https://dpi.wi.gov/sped/dispute-resolution/complain.

- Information on filing a complaint under the Individuals with Disabilities Education Act (IDEA).

Wis. DPI, *About Due Process Hearings*, https://dpi.wi.gov/sped/dispute-resolution/due-process.

- Information on filing a request for a due-process hearing.

Chapter 9
Benefits for People with Mental Disabilities

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I. Scope of Chapter [§ 9.1]

This chapter discusses both monetary and nonmonetary benefits available to individuals with mental health challenges and cognitive disabilities. There is growing recognition that these individuals may face barriers when navigating daily life. For this reason, state governments and the federal government have passed legislation to provide benefits for these more vulnerable members of society.[8]

In particular, this chapter covers the following topics: health insurance parity, worker's compensation, veterans' benefits, Social Security disability, Medicare, Medicaid, and state programs. The topics are discussed in distinct, self-contained sections, each of which contains a discussion of the law itself and explanations about how to pursue benefits, as well as practice tips for those in the trenches.

II. Mental Health Parity [§ 9.2]

A. Introduction [§ 9.3]

Before the passage of mental health parity laws, health insurers commonly provided less coverage to insured individuals seeking mental health treatment or substance use disorder treatment. Jeffrey M. Barrett, *Comment: A State of Disorder: An Analysis of Mental-Health Parity in Wisconsin and a Suggestion of Future Legislation*, 2008 Wis. L. Rev. 1159, 1161. *Parity* means "equal in treatment or value." *Wolters Kluwer Bouvier Law Dictionary: Desk Edition* (2012). Mental health parity laws aim to equalize health insurance coverage between individuals being treated for physical conditions and those individuals being treated for mental health or substance use disorders.

B. Federal Law [§ 9.4]

1. In General [§ 9.5]

It is important to understand federal parity laws and regulations first because they set the stage for Wisconsin to pass a parity law.

2. Mental Health Parity Act (MHPA) [§ 9.6]

In 1996, Congress passed the Mental Health Parity Act (MHPA), 61 Pub. L. No. 104-204 (codified as amended at 29 U.S.C. § 1185a; 42 U.S.C. § 300gg-26). The MHPA was a first step toward parity; however, one of the exclusions under the MHPA is that it did not require health insurers to offer coverage for mental health benefits. *See id.* Under the MHPA, if a health insurer did offer coverage for mental health benefits, then the insurer was required to use the same aggregate lifetime limits and annual limits for mental health treatment as for physical treatment or medical and surgical benefits. 29 U.S.C. § 1185a(a)(1)–(2).

3. The Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) [§ 9.7]

a. In General [§ 9.8]

In an effort to strengthen the MHPA, Congress passed the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA), Pub. L. No. 110-343 (codified as amended at I.R.C. § 9812; 29 U.S.C. § 1185a; 42 U.S.C. § 300gg-26). Importantly, the MHPAEA enhanced the MHPA by adding substance use disorder to the types of treatment requiring parity with physical health treatment. 29 U.S.C. § 1185a(e)(4), (5).

The MHPAEA also added the requirement that health insurers use the same financial and treatment limitations for mental health and substance use disorder treatment as for physical treatment. 29 U.S.C § 1185a(a)(3). Financial limitations include deductibles, copays, and out-of-pocket costs. *Id.* Treatment limitations include frequency of treatment and number of visits. *Id.*

b. Exceptions Under the MHPAEA [§ 9.9]

While the MHPAEA is more robust than the MHPA, there are significant exceptions. Notably there is still no requirement under the MHPAEA for a health insurer to offer mental health coverage. *See* 29 U.S.C. § 1185a(b).

Also, not all health insurers are subject to parity under the MHPAEA. 29 U.S.C. § 1185a(c). Small employers with not less than 2 but no more than 50 employees can apply for an exemption. 29 U.S.C. § 1185a(c)(1).

There are other exempt insurers as well. Medicare, Medicaid, and the Children's Health Insurance Program (CHIP) are subject to only certain aspects of MHPAEA. *See* Medicaid and Children's Health Insurance Programs; Mental Health Parity and Addiction Equity Act of 2008; the Application of Mental Health Parity Requirements to Coverage Offered by Medicaid Managed Care Organizations, the Children's Health Insurance Program (CHIP), and Alternative Benefit Plans, 81 Fed. Reg. 18,389 (Mar. 30, 2016) (to be codified at 42 C.F.R. pt. 438; 42 C.F.R. pt. 440; 42 C.F.R. pt. 456; 42 C.F.R. pt. 457). The Centers for Medicare and Medicaid Services (CMS) has a fact sheet on its website that succinctly summarizes which insurers are subject to parity. CMS, *The Mental Health Parity and Addiction Equity Act (MHPAEA)*, https://www.cms.gov/CCIIO/Programs-and-Initiatives/Other-Insurance-Protections/mhpaea_factsheet (last visited May 18, 2021).

Self-insured plans can also opt out of the MHPAEA under certain circumstances. Memorandum from Steve Larsen, Director, Office of Oversight, U.S. DHHS, RE: Amendments to the HIPAA opt-out provision (formerly section 2721(b)(2) of the Public Health Service Act) made by the Affordable Care Act (Sept. 21, 2010), https://www.cms.gov/CCIIO/Resources/Files/Downloads/opt_out_memo.pdf [hereinafter Larsen].

In some cases, if a health insurer experiences a one or two percent increase in actual total costs of coverage, then the insurer can apply for a one-year exemption. 29 U.S.C. § 1185a(c)(2).

Several conditions are not covered under the MHPAEA. Treatment for gambling, hoarding, and premenstrual syndrome (PMS) are not covered by the MHPAEA because these conditions are not listed in the *Diagnostic and Statistical Manual of Mental Disorders: DSM-5* (Am. Psych. Ass'n 5th ed. 2013). Stacey Tovino, *DSM-5: Implications for Health Law*, Utah L. Rev. 767, 778 (2015).

c. Federal Regulations Related to MHPAEA [§ 9.10]

(1) In General [§ 9.11]

Passage of the MHPAEA has resulted in a complicated web of federal regulations that should be reviewed to better understand the implementation of the MHPAEA. A few of the key regulations are discussed below.

(2) Department of the Treasury, Department of Labor, and Department of Health and Human Services [§ 9.12]

In 2013, the U.S. Department of the Treasury, U.S. Department of Labor, and U.S. Department of Health and Human Services (DHHS) published final rules on MHPAEA implementation. Final Rules Under the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008; Technical Amendment to External Review for Multi-State Plan Program, 78 Fed. Reg. 68,240 (Nov. 13, 2013) (codified at Treas. Reg. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 146; 45 C.F.R. pt. 147). These rules went into effect on January 1, 2014. Treas. Reg. § 54.9812-1(i)(1).

The regulations name six benefit classifications used to evaluate parity between insurance coverage for mental health and insurance coverage for physical health. The benefit classifications include inpatient care (in and out of network), outpatient care (in and out of network), emergency care, and prescription drugs. Treas. Reg. § 54.9812-1(c)(2)(ii).

It is important to be familiar with quantitative treatment limitations and nonquantitative treatment limitations (NQTL) when evaluating the six benefit classifications. Quantitative treatment limitations can be defined by a number, such as the number of visits in a year. Treas. Reg. § 54.9812-1(a). NQTLs are limits on treatment for mental health or substance abuse that cannot be defined numerically but "which otherwise limit the scope or duration of benefits for treatment." *Id.*; Treas. Reg. § 54.9812-1(c)(4)(ii).

Example. If a health insurer requires more proof to obtain prior authorization for mental health treatment than for physical health treatment, it could be an improper NQTL restriction.

Insurers may not impose financial or treatment limitations that are "more restrictive than substantially all medical/surgical benefits in the same category." Treas. Reg. § 54.9812-1(c)(2). *Substantially all* is defined as two-thirds. Treas. Reg. § 54.9812-1(c)(3)(i)(A).

The MHPAEA added certain public-disclosure requirements for health insurers. 29 U.S.C. § 1185a(a)(4), (f). The 2013 rule specifies that insurers must disclose plan information to insureds upon request. Treas. Reg. § 54.9812-1(d)(1). The insurer must also disclose the reason for any denials of coverage of treatment. Treas. Reg. § 54.9812-1(d)(2).

4. Affordable Care Act [§ 9.13]

The Patient Protection and Affordable Care Act, also known as the Affordable Care Act (ACA), has provisions regarding parity as well. Tovino, *supra* § 9.9, at 781. The ACA imposes parity on health plans sold on the ACA marketplace as of January 1, 2014. *Id.* at 781–82. The ACA also includes mental health and substance use disorder treatment on the list of essential health benefits (EHB). *Id.* at 782. As an EHB, mental health coverage must be provided by those insurers subject to the ACA provisions. *Id.* at 781–82.

C. Wisconsin Law [§ 9.14]

1. In General [§ 9.15]

After the MHPA was passed in 1996, states began to pass parity laws. Jeffrey M. Barrett, *Comment: A State of Disorder: An Analysis of Mental-Health Parity in Wisconsin and a Suggestion of Future Legislation*, 2008 Wis. L. Rev. 1159, 1181. Wisconsin's parity law was not passed until 2009. 2009 Wis. Act 218.

Wisconsin's parity laws are located in Wis. Stat. ch. 632 and Wis. Admin. Code ch. Ins 3. In the discussion of Wisconsin law within this chapter, any similarities to or differences with the federal MHPAEA law are noted.

2. Insurers Covered Under Wisconsin Law [§ 9.16]

Wisconsin's parity laws and regulations apply to health insurance policies issued on or after December 1, 2010. Wis. Admin. Code § Ins. 3.37(2).

Under Wisconsin law, group health benefit plans are subject to parity rules. Wis. Stat. § 632.89(2)(a). Under this statute, group health plans issued to an employer with at least two employees or an individual health benefit plan when three or more are sold to an employer are included in the definition. *Id.*

Self-insured health plans are subject to parity. Wis. Stat. § 632.745(24). Self-insured health plans as defined by the Wisconsin statutes include the plan of the state, a county, city, village, town, or school district. *Id.* By contrast, self-insured plans can opt out of the MHPAEA under certain circumstances. Larsen, *supra* § 9.9.

If a health plan is the product of collective bargaining, it may be covered by Wisconsin parity law. Wis. Admin. Code § Ins 3.375(2)(b)1.

If an insured individual in Wisconsin receives coverage from Medicare or Medicaid, treatment requires compliance with the MHPAEA and not Wisconsin's parity law. CMS, *The Mental Health Parity and Addiction Equity Act (MHPAEA)*, https://www.cms.gov/CCIIO/Programs-and-Initiatives/Other-Insurance-Protections/mhpaea_factsheet (last visited May 18, 2021).

3. Conditions and Treatment Covered Under Wisconsin Parity Law [§ 9.17]

Under Wisconsin law, "nervous and mental disorders and alcoholism and other drug abuse problems" are the conditions subject to parity. Wis. Stat. § 632.89(2)(a). Under the MHPAEA, parity is required for mental health or substance use disorder benefits. 29 U.S.C. § 1185a(e)(4), (5). While Wisconsin uses different language for the conditions that are subject to parity, as a practical matter it is essentially equivalent to the definition under the MHPAEA.

There is one important difference between Wisconsin law and the MHPAEA. Autism spectrum disorder (ASD) is listed as a neurodevelopmental disorder in the *DSM-5*, *supra* § 9.9. While conditions in the *DSM-5* are subject to parity under both Wisconsin law and the MHPAEA, ASD is a specifically excluded condition under Wisconsin parity rules. Wis. Stat. § 632.89(5)(c). Instead, it is governed by Wis. Stat. § 632.895(12m).

4. Exceptions to Parity Under Wisconsin Law [§ 9.18]

Similar to the MHPAEA, Wisconsin law does not require an insurer to provide mental health coverage. However, if the insurer does provide coverage for mental health, then the insurer is required to provide coverage in parity with coverage for physical conditions. *See* Wis. Stat. § 632.89(2)(a).

Similar to the federal law, Wisconsin has a cost exemption. Wis. Stat. § 632.89(3c)(a)(1)–(2). Wisconsin's exemption mirrors the MHPAEA. 29 U.S.C. § 1185a(c)(2).

There is also an exemption for small employers. Wis. Stat. § 632.89(3f); Wis. Admin. Code § Ins 3.75(7). In Wisconsin, an employer with fewer than 10 eligible employees can apply for an exemption. *Id.* By contrast, the MHPAEA defines a small employer as one with fewer than 50 employees. 29 U.S.C. § 1185a(c)(1).

Practice Tip. There are sample statutory exemption notices in appendices 1 and 2 of Wis. Admin. Code § Ins 3.375.

5. How Parity is Determined Under Wisconsin Law [§ 9.19]

Plans may be no more restrictive for conditions listed in Wis. Stat. § 632.89(2)(a) "than the most common or frequent type of treatment limitations applied to substantially all other coverage under the plan." Wis. Stat. § 632.89(3). *Substantially all* is defined as two-thirds, the same as under the MHPAEA. Wis. Admin. Code § Ins. 3.37(2m)(f).

For a comprehensive list of the types of coverage that must be provided in parity, see Wis. Admin. Code § Ins 3.37(3)(a)–(g).

D. Ongoing Disparity and Future Legal Changes [§ 9.20]

Despite the passage of parity laws, many mental health advocates observe that disparities still occur. A simple search on the internet will reveal numerous articles documenting how individuals seeking mental health treatment face ongoing barriers to coverage despite both state

and federal parity laws. *See, e.g.*, Jenny Gold, *Advocates Say Mental Health 'Parity' Law Is Not Fulfilling Its Promise*, Kaiser Health News (Aug. 3, 2015), https://khn.org/news/advocates-say-mental-health-parity-law-is-not-fulfilling-its-promise/; Ali Shana, *Mental Health Parity in the US: Have We Made Any Real Progress?*, Psychiatric Times (June 16, 2020), https://www.psychiatrictimes.com/view/mental-health-parity-in-the-us-have-we-made-any-real-progress.

Since the passage of the MHPAEA, bills to enhance mental health parity continue to be proposed in Congress. One such example is the Mental Health Parity Compliance Act, which was introduced in the House of Representatives in 2019. H.R. 3165, 116th Cong. (2019). This bill has the stated purpose of "strengthening" mental health parity. *Id.* at 1.

Some states have also attempted to enhance parity. California passed Senate Bill 855 in September 2020. The bill modified Cal. Health & Safety Code § 1374.72 (current with urgency legislation through Ch. 19 of 2021 Reg. Sess.), and the amended law took effect January 1, 2021. This law aims to provide even greater protection for those individuals seeking treatment for a mental health or substance abuse issue.

Information about legislative changes and proposals in Wisconsin is available at ParityTrack, *Wisconsin Regulations Parity Report*, https://www.paritytrack.org/report/wisconsin/wisconsin-regulation (last visited May 18, 2021).

E. Pursuing a Violation of Wisconsin's Parity Law [§ 9.21]

1. In General [§ 9.22]

In Wisconsin, the Office of the Commissioner of Insurance (OCI) is responsible for regulating parity under Wis. Stat. § 632.89. However, it is important to consider preemption with the MHPAEA. The OCI website explains the potential preemption in the following simple terms: "If your plan is self-funded by your employer, then it is subject to federal, not state law. Public programs like Medicare and Medicaid also have their own processes." OCI, *Grievances and Complaints*, https://oci.wi.gov/Pages/Consumers/GrievancesComplaints.aspx (last updated June 21, 2019).

Under 45 C.F.R. § 146.143(a), federal law should not supersede state law unless the state law "prevents application" of the MHPAEA. The preemption is a narrow one. Final Rules Under the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008; Technical Amendment to External Review for Multi-State Plan Program, 78 Fed. Reg. 68,240 (Nov. 13, 2013) (codified at Treas. Reg. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 146; 45 C.F.R. pt. 147).

2. Preliminary Investigation [§ 9.23]

If a violation of Wisconsin's parity law is suspected, there are a few preliminary steps to be taken.

First, determine whether the insurer is subject to parity. Also investigate whether the insurer has been granted an exemption.

Second, if applicable, obtain and review the denial from the insurer. Reasons for the denial should be stated by the insurance provider. Wis. Stat. § 632.89(3p). Keep in mind that parity violations can occur in less obvious ways than an outright denial of coverage.

Example. A violation may occur if an insurer imposes limitations on the geographical area within which an insured can obtain treatment. For people living in rural locations where access to medical treatment is less available, such a limitation may have the practical effect of barring treatment.

After these preliminary steps, determine the nature of the violation. While not directly applicable, reviewing the quantitative treatment limitations and NQTLs as defined under the federal regulations can provide a helpful framework to understand how the insurer violated parity. Treas. Reg. § 54.9812-1(a), (c)(4)(ii).

It is important to obtain evidence. Evidence might include a letter of support from a treating medical professional. Another form of evidence could be documentation of phone call attempts showing the hurdles an insured endured attempting to obtain coverage.

3. How to File a Grievance or Complaint [§ 9.24]

Some health insurers may be willing to resolve disputes about coverage informally by contacting the insurer directly. However, if the informal process does not resolve the problem, a formal written grievance can be filed.

The type of insurer will dictate where the complaint should be filed. The OCI has a helpful fact sheet to guide complainants on how to proceed with a formal complaint. OCI, *Health Insurance Grievances and Complaints* (rev. Dec. 2018), https://oci.wi.gov/Documents/Consumers/PI-217.pdf.

For complaints against group health plans in Wisconsin, a grievance should be filed online with the OCI. The insurance carrier must acknowledge the grievance within five business days after filing. Notice of a grievance review must be given at least seven days in advance. A complainant can appear at a grievance review hearing. If an insured receives an unsatisfactory result after a grievance hearing and files an appeal, an independent review is conducted. Many plans opt to use the federal external review process. *Id.*

If an insured is covered by Medicare or Medicaid, grievances should be filed directly with the insurer. In this circumstance, the grievance process as outlined by the OCI will not apply. For complaints against a self-insured provider, contact the Department of Labor. *See, e.g.*, U.S. DHHS, Substance Abuse & Mental Health Servs., Admin., *Parity of Mental Health and Substance Use Benefits with Other Benefits: Using Your Employer-Sponsored Health Plan to Cover Services*, https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/mental-health-parity/parity-of-mental-health-and-substance-use-benefits-with-other-benefits.pdf (last visited Apr. 15, 2021).

4. Other Resources [§ 9.25]

There are a variety of nonprofit organizations and agencies that track and provide education on parity issues. Some of these groups include the National Alliance on Mental Illness, the National Institute of Mental Health, Mental Health America, and the American Psychological Association.

III. Worker's Compensation [§ 9.26]

A. Introduction [§ 9.27]

In 1911, Wisconsin enacted the Worker's Compensation Act (WCA). Dep't of Workforce Dev. (DWD), *Brief History*, https://dwd.wisconsin.gov/wc/brief-history.htm (last visited May 18, 2021). After a legal challenge, the Wisconsin Supreme Court upheld the WCA later that year. *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N.W. 209 (1911). Before the passage of the WCA, employees injured during the course of their employment pursued benefits under the tort system. *Brief History*, *supra*.

Worker's compensation is governed by state law unless the injured worker works for the federal government. In that instance, the Department of Labor is the governing agency. U.S. DOL, Office of Workers' Compensation Programs, *Federal Employees Compensation Act—Frequently Asked Questions*, https://www.dol.gov/agencies/owcp/FECA/fec-faq (last visited May 18, 2021).

B. WCA [§ 9.28]

1. Statutory and Regulatory Basis [§ 9.29]

The WCA is in Wis. Stat. ch. 102. There are also administrative regulations, in Wis. Admin. Code ch. DWD 80, ch. LIRC 3, and ch. HA 4. In Wisconsin, the DWD oversees worker's compensation claims.

2. Purpose of WCA [§ 9.30]

The legislature had several goals when drafting the WCA. One goal was to provide a faster method of recovery than under the tort system. For that reason, the WCA is a no-fault system. Wis. Stat. § 102.03. The WCA is also the exclusive remedy for workers injured on the job. Wis. Stat. § 102.03(2). Third-party claims are exempt from this exclusivity provision and can be pursued under the tort system. Wis. Stat. § 102.29(1)(a).

3. Elements to a Worker's Compensation Claim [§ 9.31]

a. In General [§ 9.32]

There are five elements to any worker's compensation claim. First, there must be an employer-employee relationship. Second, for purposes of this book, there must be a mental injury. Third, the injury must occur in the course and scope of employment. Fourth, the injury must arise out of the employment. Finally, the injury cannot be self-inflicted.

b. Employer-Employee Relationship [§ 9.33]

The term employer has a broad definition under Wisconsin law. For a list of what constitutes an employer for purposes of the WCA, see Wis. Stat. § 102.04. Similarly, what qualifies someone as an employee is also broad. Wis. Stat. § 102.07. There is an enumerated test in the statutes to determine whether an injured worker is an employee or an independent contractor. Wis. Stat. § 102.07(8).

c. Injury Definition Generally [§ 9.34]

Under the WCA, injuries are defined as either scheduled or unscheduled. *Scheduled injuries* are physical in nature and can occur to the upper and lower extremities, vision, or hearing. Wis. Stat §§ 102.52–.555; Wis. Admin. Code § DWD 80.32. *Unscheduled injuries* can be physical or mental in nature and can occur to the spine, head, whole body, or mental health. *See* Wis. Stat §§ 102.52–.555; Wis. Admin. Code § DWD 80.32.

d. Mental Injury [§ 9.35]

(1) In General [§ 9.36]

Under the WCA, there are three types of mental injuries. The first type is a physical to mental injury. This occurs when a physical injury on the job causes a related mental health problem. For example, many people who develop pain from a physical injury also develop depression because they are unable to do the same activities they used to do. The second type of injury is a mental to mental injury. This is when a psychological event at work, such as a supervisor using a berating tone, results in a mental health problem, such as anxiety, in the employee. The final type of injury is mental to physical. This occurs when an employee develops a mental health problem as a result of work and that mental health injury causes physical symptoms.

(2) Physical to Mental Injury [§ 9.37]

An example of a physical to mental injury is a bank teller who develops posttraumatic stress disorder (PTSD) after being shot by a bank robber while on the job. In that instance, the injured worker would have physical or scheduled injuries from the gunshot wound. In addition, the injured worker might also have a mental injury in the form of PTSD that arose from the stress of the same situation that caused the physical injuries.

In April 2021, Governor Tony Evers signed 2021 Wis. Act 29 into law. Among other things, the Act modified the WCA and allows for worker's compensation benefits for first responders, such as firefighters and law enforcement officers, who are diagnosed with PTSD as a result of a work-related injury. Wis. Stat. § 102.17(9). An employer's liability for treatment of an employee's mental injury that is compensable under Wis. Stat. § 102.17(9) cannot exceed 32 weeks after the injury is first reported, Wis. Stat. § 102.42(1p), and the period of disability cannot exceed 32 weeks, Wis. Stat. § 102.44(7).

(3) Mental to Mental Injury [§ 9.38]

Mental to mental injuries can be difficult to pursue. The employee must meet the requirements of the "extraordinary stress test" as defined by the Wisconsin Supreme Court. *Swiss Colony, Inc. v. Department of Ind., Labor & Hum. Rels.*, 72 Wis. 2d 46, 55–56, 240 N.W.2d 128 (1976). The idea behind the test is that an employee must experience an unexpected event or series of events that are beyond the normal, day-to-day stresses of the workplace. *Id.*

(4) Mental to Physical Injury [§ 9.39]

The third type of mental injury is mental to physical. An illustrative situation is when an injured worker develops a *conversion disorder*, or functional neurological symptom disorder. *DSM-5*, *supra* § 9.9, at 318. This condition might develop when an injured worker suffers a mental injury on the job and that mental injury causes physical symptoms. While these physical symptoms are very real to the injured worker, the physical symptoms cannot be explained or corroborated by medical or neurological testing.

e. Course and Scope of Employment [§ 9.40]

The statutes define the course and scope of employment as when an employee "is performing service growing out of and incidental to his or her employment." Wis. Stat. § 102.03(1)(c). This is a liberal standard to be construed in favor of the employee.

f. Injury Must Arise Out of Employment [§ 9.41]

Under Wis. Stat. § 102.02(1)(e), the employee's accident or disease must arise out of employment. This requirement is ultimately one of causation. Under the WCA, causation is a medical question rather than a legal one.

A licensed medical professional listed in Wis. Stat. § 102.17(1)(d)1. must opine on a WKC-16B form as to causation. The WKC-16B, along with most other forms used in worker's compensation practice, can be found on the DWD's website, *Worker's Compensation Forms List*, https://dwd.wisconsin.gov/wc/about-us/formsorder.htm (last visited May 18, 2021).

There are three types of causation under the WCA. The first is an accident or a one-time occurrence. The second is an occupational disease or an injury that develops over time. The third is an aggravation of a preexisting condition.

g. Injury Cannot Be Self-Inflicted [§ 9.42]

As stated above, self-inflicted injuries are not compensable. However, death by suicide can be compensable if a medical professional finds causation that links the employee's suicide to an injury sustained on the job. *Cohn v. Apogee, Inc.*, 225 Wis. 2d 815, 820, 593 N.W.2d 921 (Ct. App. 1999).

4. Benefits Available to Injured Workers in Wisconsin [§ 9.43]

a. In General [§ 9.44]

Injured workers are able to pursue a variety of monetary and nonmonetary benefits under the WCA. Monetary benefits paid to an employee for a work injury are tax free. I.R.C. § 104(a)(1).

Wisconsin is in a minority of states that offsets worker's compensation benefits if an injured worker contemporaneously receives Social Security disability benefits. Wis. Stat. § 102.44(5). Most other states offset Social Security disability benefits by the receipt of worker's compensation benefits.

The purpose of the offset is to prevent an injured worker from receiving more money from worker's compensation and the Social Security Administration than the injured worker would have received while working. In Wisconsin, attorneys handling worker's compensation claims should obtain offset information from the Social Security Administration on form WKC-6119-E, which is available on the DWD's website. This form only needs to be filled out if the injured worker has already been approved for Social Security benefits at the time of settlement or a favorable award of worker's compensation benefits in litigation.

b. Lost Wages [§ 9.45]

When an injured worker is unable to perform any work, temporary total disability (TTD) is paid to supplement the injured worker's lost wages. Wis. Stat. § 102.43. TTD is paid at a rate of two-thirds of the injured worker's average weekly wage. *Id.*

When an injured worker works fewer hours or is paid less money to perform a light-duty job while recovering from a work injury, temporary partial disability (TPD) can be paid. In that instance, the injured worker is paid the difference between the average weekly wage and the actual wages earned. Wis. Stat. § 102.43(2).

c. Permanent Disability [§ 9.46]

(1) Permanent Partial Disability (PPD) [§ 9.47]

For scheduled injuries, payment is determined by statute. Wis. Stat. § 102.52. There is a schedule that values each part of the body with a set number of weeks. *Id.*

Example. Loss of the arm at the shoulder is worth 500 weeks. Wis. Stat. § 102.52(1). If a worker sustains a 5% permanent partial disability (PPD) to the arm, the worker would be entitled to 25 weeks of PPD (500 x 5%). The 5% is paid out at the PPD rate for the year of the injury. The PPD rate is determined by the DWD each year. *See* DWD, *Maximum Wage and Rate Chart* (rev. Dec. 2020), https://dwd.wisconsin.gov/dwd/publications/wc/wkc-9572-p.pdf.

Unscheduled injuries are calculated based on the body as a whole, which is "worth" 1,000 weeks. Wis. Stat. § 102.44(3). The calculation for unscheduled injuries is performed in the same way as calculations for scheduled injuries.

Example. If an injured worker sustains a 5% PPD rating for a mental injury, the injured worker would be entitled to 50 weeks of PPD payments (1,000 x 5%).

(2) Permanent Total Disability (PTD) [§ 9.48]

An injured worker who is unable to work again as a result of a serious work injury is entitled to be paid TTD for the rest of the worker's life. Wis. Stat. § 102.44. This benefit is called permanent total disability (PTD).

One way to prove an injured worker is entitled to PTD is through the *odd-lot doctrine*. This means that when a combination of injury, age, education, and vocational factors results in an injured worker not being able to perform any job, the injured worker may be entitled to PTD. *Smith v. Milwaukee Scrap Metal Co.*, WC Claim No. 1996012444 (LIRC Feb. 25, 1999).

d. Disfigurement [§ 9.49]

When an injured worker is disfigured by a work injury, benefits are payable if the disfigurement is visible during the "normal course of employment." Wis. Stat. § 102.56(1).

Example. In the context of mental health, a hand tremor that develops out of work-related anxiety injury could constitute disfigurement.

e. Medical Treatment [§ 9.50]

An injured worker can receive "reasonably necessary" medical treatment. Wis. Stat. § 102.42(1). This medical treatment can include mental health treatment. Wis. Stat. § 102.42(2). The injured worker also is entitled to reimbursement for travel to medical appointments for a work-related injury. Wis. Stat. § 102.17(8).

For injured workers on state health insurance, Medicaid will pay for work-related medical treatment. However, Medicaid has a subrogation right against any funds paid out by the worker's compensation insurance carrier. 42 U.S.C. § 1396a; 42 C.F.R. § 433.135.

Injured workers who are currently on Medicare or who may become eligible for Medicare based on the receipt of Social Security disability benefits will need a Medicare set-aside agreement (MSA) for any award over $25,000. Letter from Deputy Dir., Purchasing Pol'y Grp., Ctr. for Medicare Mgmt., *Workers' Compensation: Commutation of Future Benefits* (July 23, 2001), https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Workers-Compensation-Medicare-Set-Aside-Arrangements/WCMSA-Memorandums/Downloads/July-23-2001-Memorandum.pdf. An MSA is a special financial account created by the worker's compensation insurance carrier. Funds in the MSA can be used only for future medical costs related to treatment of the work injury. Medicare requires the creation of these accounts to offset its own costs. When possible, worker's compensation attorneys may consider negotiating for settlements that are less than the $25,000 threshold to avoid this complicated process.

f. Death Benefit [§ 9.51]

When an injured worker dies, a death benefit is payable under three circumstances. Wis. Stat. § 102.46. These circumstances are the following: if the employee dies as a direct result of a work injury, an injured worker receiving PTD dies from any cause, or an injured worker dies for a reason not related to the work injury before PPD is paid. Some dependents, such as a spouse and children of the deceased injured worker, might also be eligible for payment. Wis. Stat. § 102.45.

g. Benefits Not Available Under the WCA [§ 9.52]

Notably, payment for pain and suffering is not available under the WCA. This is particularly important when considering mental health issues that arise out of employment.

A version of punitive damages can be paid if a safety violation occurred: an employer knew or should have known of a work hazard that led to its employee's injury. Wis. Stat. § 102.57. In this scenario, employers often face penalties and fines from the Occupational Safety and Health Administration (OSHA).

Example. An employer that removes a safety guard from a machine or piece of equipment resulting in an injury to an employee could be fined for a safety violation.

For injuries that occurred on or after March 2, 2016, injuries that result from intoxication on the job in violation of an employer's drug or alcohol policy bar an employee from recovering death or disability benefits under the WCA. Wis. Stat. § 102.58(2).

5. How to Pursue Benefits [§ 9.53]

a. In General [§ 9.54]

In Wisconsin, employers are required to obtain insurance coverage for work injuries. Wis. Stat. § 102.04(1). However, the Uninsured Employers Fund (UEF) might pay benefits to injured workers whose employer is not insured. Wis. Stat. §§ 102.80–.81. There are significant penalties for failure to carry worker's compensation insurance, including the following:

- Payment of double the cost of insurance premiums that should have been paid during the uninsured period or $750, Wis. Stat. § 102.82(2)(a);
- Forced closure and ceasing of operations for an uninsured employer, Wis. Stat. § 102.28(4);
- Personal liability for all benefit claims, Wis. Stat. § 102.28(5); and
- Reimbursement to the DWD for all payments made to the insured employee and any dependents, Wis. Stat. § 102.82(1).

b. File a Claim with the Insurance Carrier [§ 9.55]

After an employee suffers an injury on the job, the injured employee should notify the worker's compensation insurance carrier and file a claim as soon as possible. *See* Wis. Stat. § 102.12. However, as of February 2016, an injured worker has 6 years to pursue a claim for an accident and 12 years for occupational injury. Wis. Stat. § 102.17(4).

Practice Tip. Attorney fees cannot exceed 20% of disputed benefits. Wis. Stat. § 102.26(2). It is wise for the claimant's attorney to wait to file a notice of appearance with the worker's compensation insurance carrier until after the claim is formally denied. If the claim is approved, an attorney fee might not be payable. Also, attorney fees will not be paid on amounts recovered for reimbursement of medical expenses. Wis. Stat. § 102.30(7)(a).

c. Investigation [§ 9.56]

After the claim is filed, the worker's compensation insurance carrier will conduct an investigation and determine whether to pay benefits. In some cases, the insurance carrier will approve or deny the claim outright.

In other cases, the insurance carrier will pay benefits for a period of time and then cut off benefits at the end of healing (discussed in greater detail below). The date healing ends is a point of dispute in many cases.

As a part of the investigation, the insurance carrier will generally order an independent medical examination (IME). The IME is performed by a physician who is paid by the insurance carrier. The IME physician will either read the medical records or personally examine the injured worker and issue a report about causation, permanency, and end of healing.

d. End of Healing [§ 9.57]

After a work injury, there will be a period of time in which the injured worker is done healing from the injury. An injured worker may have ongoing symptoms and still be at the end of healing. However, if a physician opines the condition is stable and is not likely to improve or get worse, the end of healing has been reached.

Once the end of healing is reached, the next step is to obtain a WKC-16B opinion from one of the injured worker's treating medical providers. Upon obtaining a completed WKC-16B and the supporting medical records, a claim is ready to move into litigation.

e. Litigation [§ 9.58]

The first step is to file a hearing application with the DWD. At this point, a defense attorney for the insurance carrier is usually assigned to the claim. Before an application for hearing is filed, a claims adjuster for the insurance carrier typically handles the case.

Practice Tip. At this stage it is advisable to send a demand to the defense attorney outlining arguments and total damages. This is a common practice in personal-injury litigation but can also be very useful in a worker's compensation claim.

If a settlement cannot be reached after filing a hearing application, a certificate of readiness (COR) must be filed with the DWD. The COR notifies the court that counsel is ready for a hearing to be scheduled with an administrative law judge (ALJ).

If a case does go to a hearing, the injured worker has 21 days from the date of an ALJ's order to appeal to the Labor, Industry, and Review Commission (LIRC). LIRC is independent from the DWD. 2015 Wis. Act 55. After a LIRC decision, further appeals can be pursued in circuit court. Wis. Stat. § 102.23. Because most cases settle, these lengthy litigation options are not often used.

If a settlement is reached, a compromise agreement will be signed by the insurance carrier and the injured worker. The signed compromise agreement must be submitted to the DWD ALJ for approval. If approved, the ALJ will issue an order. Within 21 days after the order, payment must be made by the worker's compensation insurance carrier. Wis. Stat. § 102.18(1)(e).

6. Practical Considerations [§ 9.59]

When representing an injured worker with mental health issues, it may be appropriate to consider a power of attorney. A guardianship may be needed if there are serious cognitive limitations.

Also, a special-needs trust can protect settlement funds if an injured worker receives public assistance benefits such as Social Security disability or Medicaid.

The Achieving a Better Life Experience (ABLE) Act was passed in 2014. I.R.C. § 529A. This law allows for the creation of trusts that protect money from being considered an asset that would disqualify a person from receipt of public benefits. Wisconsin allows ABLE accounts. Wis. Stat. § 71.98(7). Additional information about ABLE accounts is available on the website of Wispact, a private nonprofit organization that administers pooled and community special needs trusts for people with disabilities. *See* https://www.wispact.org/.

7. Other Resources [§ 9.60]

For more information about the WCA in Wisconsin, see the DWD website, https://dwd.wisconsin.gov/; John D. Neal & Joseph Danas, Jr., *Worker's Compensation Handbook* (State Bar of Wis. 9th ed. 2019 & Supp.); and Thomas M. Domer & Charles F. Domer, *Wisconsin Workers' Compensation Law* (2019–20).

IV. Veterans' Benefits [§ 9.61]

A. Introduction [§ 9.62]

The U.S. Department of Veterans Affairs (VA) (formerly the Veterans Administration) was created in 1930. In 1958, Congress passed 38 U.S.C. § 501. This law became the foundation of federal veterans' disability benefits today.

In Wisconsin, laws directly regarding veterans are in Wis. Stat. ch. 45. For purposes of this chapter, only federal laws will be discussed because the definition of veterans' disability under Wisconsin law refers to federal law. Wis. Stat. § 45.01(9).

Veterans' benefits can be likened to worker's compensation for veterans. The VA pays monetary benefits to military veterans who were injured during their service or who die as a result of their service. The main benefit discussed in this chapter is disability compensation.

B. Disability Compensation [§ 9.63]

1. Claim Requirements [§ 9.64]

There are three elements to a claim for disability compensation. These three elements are needed to establish a prima facie case.

First, the person must be a veteran. A veteran means a person who served in the active military, naval, air, or space service. 38 U.S.C. § 101(2).

The second element requires the veteran to be discharged under conditions other than dishonorable. *Id.* The nature of a veteran's discharge can be found on VA Form 2214. On this form a discharge that is "honorable" or "under honorable conditions" is sufficient to proceed with a claim for disability compensation.

The third element is that the health issue or death of the veteran has a direct service connection. 38 C.F.R. § 3.303(a). Whether a service connection exists is a medical question that is answered by a medical professional. The physician opines as to service connection on a Disability Benefits Questionnaire (DBQ) form. The DBQ form is specific to mental health.

2. Direct Service Connection Requirements [§ 9.65]

a. In General [§ 9.66]

Three factors must be present for a direct service connection to exist: a current disability; an event, injury, or disease in service; and a link or nexus establishing that the current disability had its onset or inception in service. 38 C.F.R. § 3.303(a).

b. Current Disability [§ 9.67]

The VA will accept several types of evidence to prove a current disability. A veteran may submit a letter or statement, medical records, or medical treatises and journals. 38 U.S.C. § 1110; 38 U.S.C. § 1131. The VA will also accept lay statements from the veteran about the event in service. 38 U.S.C. § 1154(b).

A compensation and pension exam, which is much like an IME in the worker's compensation context, is a report by a medical professional hired by the VA opining as to the existence and extent of current disability. 38 C.F.R. § 3.326(a). The compensation and pension exam will be conducted by an employee at the VA Medical Center (VAMC) or by a third-party organization that is contracted by the VA to perform the exams.

c. Event, Injury, or Disease in Service [§ 9.68]

The VA uses a liberal standard to assess the existence of the second requirement—that the event, injury, or disease occurred in service. "Service connection connotes many factors but basically it means that the facts, shown by evidence, establish that a particular injury or disease resulting in disability was incurred coincident with service." 38 C.F.R. § 3.303(a).

In addition, there is a presumption of soundness for all veterans "except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment" into service. 38 U.S.C. § 1111.

d. Link or Nexus [§ 9.69]

(1) In General [§ 9.70]

There are four legal theories that can be used to establish that a current disability had its onset in service.

Practice Tip. Wisconsin attorney James Brzezinski worked as a disability compensation claims examiner at the VA before attending law school. During his training, he was taught that the VA presumes that medical conditions that develop during the service are related to the veteran's service. There have been many studies conducted over the years showing that individuals who serve in the military experience more stress than the average person and so the VA generally accepts that any condition that develops during service is related to the additional stress veterans endure.

(2) Direct Service Connection [§ 9.71]

One legal theory is a direct service connection. 38 C.F.R. § 3.301(a). This nexus would apply if the event occurred in the service.

Example. If a veteran has a heart attack while in the service, the VA will assume the heart attack is service connected.

(3) Aggravation of Injury or Disease [§ 9.72]

Another legal theory is an aggravation of an injury or disease that existed before service. 38 U.S.C. § 1110; 38 U.S.C. § 1131. A key issue is whether the condition was noted when the veteran was examined, accepted, and enrolled for service. Evidence of disease on the veteran's exit exam can also prove helpful in this context. If the condition was not noted, then the presumption of soundness applies.

(4) Presumptive Service Connection [§ 9.73]

A third legal theory is a presumptive service connection. 38 C.F.R. § 3.307(a)(1). The policy behind presumptive service connection is that a disease that first manifested after service likely began during service. As such, the veteran should not be required to obtain medical evidence to prove this connection. Before a condition is presumed to be service connected, a scientific study is generally performed showing a statistical link to these conditions and the veteran's service.

Example. A presumptive service connection applies to veterans with Type II diabetes who were exposed to Agent Orange. U.S. DVA, *Agent Orange Exposure and VA Disability Compensation*, https://www.va.gov/disability/eligibility/hazardous-materials-exposure/agent-orange and scroll down to **Full eligibility requirements** (last updated Sept. 18, 2020).

(5) VA Malpractice [§ 9.74]

The fourth legal theory is that a veteran can make a claim for VA malpractice, alleging that negligent treatment by the VA during service or while under the care of a VA Hospital caused the injury. 38 U.S.C. § 1151. If negligence is a factor, the veteran can file a claim under the Federal Tort Claims Act. Both avenues may be pursued simultaneously.

3. Secondary Conditions [§ 9.75]

Secondary conditions are those that develop as a result of a service-connected disability. 38 C.F.R. § 3.310.

Example. If a veteran has service-connected depression, which later develops into an alcohol-use disorder, both the depression and the alcohol-use disorder can be considered service connected.

4. Standard of Proof [§ 9.76]

The standard of proof in VA claims is low. For every decision, it must be "as least as likely as not" that the veteran's current disability is due to his or her service event or injury. This is essentially a 50–50 standard and a tie will be resolved in favor of the veteran. *See* 38 U.S.C. § 5107(b).

5. Exclusions [§ 9.77]

While there is a liberal standard weighing in favor of the veteran, there are some exclusions. Willful misconduct that results in an injury or health problem will not be considered. 38 C.F.R. § 3.1(n). Conduct arising from the use of alcohol is willful misconduct. 38 C.F.R. § 3.301(c)(2). Drug abuse is also considered willful misconduct. 38 C.F.R. § 3.301(d). However, if a substance use disorder is secondary to a service-connected disability, it could be covered.

Suicide is not considered willful misconduct if the deceased veteran was of unsound mind at the time of the suicide. 38 C.F.R. § 3.302(a)–(b). Arguably, all veterans who commit suicide are of unsound mind in such a moment, and attorneys seeking benefits for their clients as a result should argue this point if benefits are denied.

6. Mental Health Conditions [§ 9.78]

(1) In General [§ 9.79]

There are many conditions that will be considered for disability compensation. Conditions listed in the *DSM-5* are included. 38 C.F.R. § 4.130. However, personality disorders are not considered for disability compensation because they are considered congenital by the VA and therefore did not arise out of the veteran's service. 38 C.F.R. § 3.303(c).

(2) Posttraumatic Stress Disorder (PTSD) [§ 9.80]

PTSD has received more attention in recent years. For claims filed after July 13, 2010, a veteran must prove that an event or circumstance in service caused an actual threat of death or serious injury and the veteran responded with fear, helplessness, or horror. 38 C.F.R. § 3.304(f)(3).

If the event happened while engaging in combat or is related to the fear of hostile military or terrorist activity, then the VA will presume the stressful event occurred unless there is evidence to the contrary. *Id.* No actual proof is required in these types of cases.

(3) Military Sexual Trauma [§ 9.81]

Another common type of mental health claim that is now filed more frequently is for military sexual trauma. This condition develops when a veteran is sexually assaulted or battered. This claim can be filed regardless of gender. It can be challenging to substantiate military sexual trauma claims because many incidents of personal assault are not reported.

Practice Tip. If there is no contemporaneous report of the assault, it is helpful to look at evidence of behavioral changes around the time of the assault, including increased use of personal leave, or even personal journal or diary entries.

(4) Suicide [§ 9.82]

The suicide rate among veterans is high. Off. of Mental Health & Suicide Prevention, U.S. DVA, *2020 National Veteran Suicide Prevention Annual Report*, https://www.mentalhealth.va.gov/docs/data-sheets/2020/2020-National-Veteran-Suicide-Prevention-Annual-Report-11-2020-508.pdf. Suicide is always considered secondary to a service-connected mental health condition. *See* 38 C.F.R. § 3.302(a)–(b).

If the suicide occurs while the veteran is in service, dependents of the veteran can receive a death benefit called dependency and indemnity compensation. If the suicide occurs after the veteran is out of service, then disability compensation payments are made.

(5) Traumatic Brain Injury (TBI) [§ 9.83]

The VA reports significant numbers of veterans who sustained TBI as a result of military service. Health.mil, *DoD TBI Worldwide Numbers*, https://www.health.mil/About-MHS/OASDHA/Defense-Health-Agency/Research-and-Development/Traumatic-Brain-Injury-Center-of-Excellence/DoD-TBI-Worldwide-Numbers (last visited May 18, 2021).

TBIs have both physical and mental effects on the body. The VA uses a system called pyramiding to sort out the physical and mental symptoms. If symptoms can be separated, then the physical and mental conditions will receive separate disability compensation ratings. If symptoms cannot be separated, the VA will assign a disability compensation rating to the most appropriate system. U.S. DVA, *M21-1, Part III, Subpart iv, Chapter 4, Section N - Neurological Conditions and Convulsive Disorders*, https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000076269/M21-1,-Part-III,-Subpart-iv,-Chapter-4,-Section-N---Neurological-Conditions-and-Convulsive-Disorders (last visited May 18, 2021).

7. Calculating Benefits [§ 9.84]

When a veteran files a claim for a service-connected disability with the VA, the veteran will receive a percentage of disability rating. These percentages are decided in increments of 10. Veterans can receive a rating from 0% to 100%. 38 C.F.R. § 4.130.

One unusual aspect to VA law is what is sometimes referred to as "VA math." When two or more conditions are rated, the lesser rating is not simply added to the original rating. The lesser ratings are multiplied by the remaining "percentage of the whole person" after the original rating is subtracted.

Example.
60% original disability + 20% additional disability found = 70%

How?
60% disabled and 40% not disabled
20% new disability of 40% nondisabled part = 8%
8% + 60% = 68% (round up under traditional rounding rules)

Practice Tip. Many veterans suffer from several service-connected mental health conditions at the same time. However, a veteran cannot receive a disability rating for two service-connected mental health disorders that tend to produce the same or overlapping symptoms. In that circumstance, the VA will assign one overall disability rating. U.S. DVA, *M21-1, Part III, Subpart iv, Chapter 4, Section O – Mental Disorders*, https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000076270/M21-1,-Part-III,-Subpart-iv,-Chapter-4,__-Section-O---Mental-Disorders (last visited May 18, 2021).

C. Other Benefits Payable [§ 9.85]

1. Total Disability Individual Unemployability [§ 9.86]

In addition to disability compensation, the VA also pays benefits for total disability individual unemployability (TDIU). 38 C.F.R. § 4.16. When a disability or combination of disabilities that are service connected result in the veteran being unemployable, the veteran will be granted a 100% disability.

Practice Tip. The VA will generally need one disability to be rated at 60% or a combination of disabilities equal to 70% before granting a claim for TDIU. However, no matter what the percentage of disability is, the veteran should file for TDIU if the service-connected disabilities render the veteran unemployable. There is a provision for extra-schedular consideration of TDIU in these circumstances. 38 C.F.R. § 3.321(b).

2. Dependency and Indemnity Compensation [§ 9.87]

Another benefit the VA pays is called dependency and indemnity compensation (DIC). This benefit is payable to dependents if the death of the veteran is service related or related to a service-connected condition. 38 C.F.R. § 3.5(a). A surviving spouse can sometimes receive a pension under the DIC rules. 38 U.S.C § 501(a).

If the veteran is 100% disabled under VA rules for at least 10 years before death, the VA will consider the death service connected no matter the actual cause. 38 C.F.R. § 3.22(a)(2)(i). This provision can help dependents of veterans with severe mental health disabilities qualify for DIC.

D. Claims Process [§ 9.88]

1. Statute of Limitation [§ 9.89]

There is no statute of limitation for filing a claim for VA benefits.

2. Appeals [§ 9.90]

a. In General [§ 9.91]

On February 19, 2019, the VA began using the Appeals Modernization Act (AMA). Any claims filed before this date are under the legacy system. If a veteran already filed a claim under the legacy system, the veteran could later choose to have the case decided under the new AMA system.

b. Legacy Appeals System [§ 9.92]

Under the legacy appeals system, the first step is for the veteran to file a claim. Upon receiving the claim, the VA reviews the case and issues a rating. If the veteran disagrees with the rating, the veteran can, within one year, file a notice of disagreement (NOD), using Form 21-0958.

If after receiving the NOD, the VA grants only some or none of the benefits sought on the NOD, the VA sends out a statement of the case (SOC). If the veteran disagrees with the SOC, then the veteran can file a VA Form 9 within 60 days. The veteran has the choice to opt into the AMA process at this point.

If the veteran files a Form 9, the case will be sent to the Board of Veterans Appeals (BVA) in Washington, D.C. On Form 9, the veteran can opt for either an in-person hearing or a videoconference hearing with a veterans' law judge. The veteran can also choose to waive the hearing and ask for a decision on the record.

The BVA will do one of three things: grant benefits, deny benefits, or remand the case to the VA to develop more evidence.

If the case is remanded, the VA will then attempt to obtain the new evidence and make a new decision. If the benefits requested are fully granted, the VA will issue a ratings decision. If the VA cannot grant all or part of the claim, it will issue a supplemental statement of the case (SSOC) and send the case back to the BVA.

Practice Tip. The standard rules of evidence do not apply at BVA hearings. Attorneys should familiarize themselves with the types of evidence that can be submitted and how evidence can be submitted.

If the BVA denies the claim, the veteran can appeal to the U.S. Court of Appeals for Veterans' Claims (CAVC). The CAVC could remand the case for further proceedings. If the case is denied, then the next step is to appeal to the Federal Circuit Court of Appeals.

c. AMA Appeals [§ 9.93]

The appeals process is discussed at Veterans Benefits Admin., *Appeals Modernization* (May 2018), https://www.bva.va.gov/docs/Appeals_Modernization_Brief_May2018.pdf.

E. Practice Tips [§ 9.94]

- Before an attorney can handle a case before the VA, an attorney must obtain certification from the VA. *See* VA Accreditation Program, *How to Apply for VA Accreditation as an Attorney or Claims Agent*, https://www.va.gov/OGC/docs/Accred/HowtoApplyforAccreditation.pdf (last visited May 18, 2021).
- An attorney cannot be paid a fee on an initial award. Once the veteran receives a denial, an attorney can receive a reasonable fee on past-due benefits. 38 C.F.R. § 14.636(e).
- In situations in which a veteran has not yet filed a claim, it can be helpful to refer veterans to local veteran service organizations to help with the initial application. Veterans can also contact the National Veterans Legal Services Program for assistance with a case.
- Finally, disability compensation is not to be confused with military law. Military law is handled under the executive branch. Disability compensation is administrative in nature, and all cases are handled through the VA.

V. Social Security Disability Benefits [§ 9.95]

In discussing disability, it is imperative to note that disability, as defined by the Social Security Act (the Act), is a legal designation rather than a medical designation. 42 U.S.C. § 423(d)(2)(A) states that a claimant

> shall be determined to be under a disability only if his *physical or mental* impairment or impairments are of such severity that he is not only not able to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy… in significant numbers….

(Emphasis added.)

The Act's definition of disability is based on the functional limitations imposed by a severe health impairment, its symptoms, and associated treatment. This definition is both hotly contested and wildly subjective. A medical treater may state that a patient "is disabled" but such an assertion is not determinative—the question of disability is reserved for the adjudicator. 20 C.F.R. § 404.1527. In assessing a claimant with functional limitations, the evaluator will focus on whether jobs exist in substantial numbers in the marketplace, and whether the claimant may perform the job competitively on a full-time basis, in light of those limitations. Issues such as whether the claimant wants to perform the job, the claimant wants or can travel to the job, and there are open positions to fill are not reviewed in the determination.

In sum, to be deemed disabled, the individual must have a severe impairment with signs and symptoms that cause functional limitations to the extent that competitive work is not possible.

VI. Medicare and Medicaid [§ 9.96]

A. In General [§ 9.97]

Medicare and Medicaid are the two government-provided health coverage programs that were established in 1965. President Lyndon Johnson signed into law what is now referred to as the "Medicare Law" as part of amendments to the SSA; this enactment was considered to be a massive accomplishment for furthering the federal goal of societal healthcare. The Medicare Law, 79 Stat. 286, established both Medicare and Medicaid programs. Medicare was created to provide "health insurance benefits for the aged," largely described as "hospital insurance benefits." *Id.* Medicaid was created to provide health insurance for low-income Americans.

The current versions of the programs are found at 42 U.S.C. §§ 1395–1395*lll*.

B. Medicare [§ 9.98]

Medicare benefits extend to the following:

- Individuals who have reached age 65 or older,
- Younger people who receive Social Security disability benefits, and
- Individuals requiring dialysis treatment or kidney transplants for end-stage renal disease.

Benefits for both programs are now administered by the CMS. Medicare services are divided into four categories known commonly as Part A, Part B, Part C, and Part D.

Part A	**Part B**	**Part C**	**Part D**
+ Hospital coverage + Nursing home facility coverage + Hospice care + Selected home health services	+ Physician care + Outpatient care + Preventative care + Medical supplies	+ Medicare Advantage plans	+ Prescription medications

Practice Tip. Attorneys with basic questions about Medicare are best served by visiting the Medicare.gov website rather than the technical, no-frills CMS.gov website.

Many applicants for Social Security disability insurance (SSDI) benefits look forward to their Medicare eligibility if awarded benefits. SSDI recipients are eligible for Medicare coverage 29 full months after the onset date of their disability—designated by the SSA. Why 29? That amount of time is the result of a math problem: Paid benefits begin after a 5 *full* months' eligibility waiting period added to a 24 months' Medicare waiting period.

Both the 5- and 24-month waiting period were suggested by the House Committee on Ways and Means Report in 1971 (passed the following year) when Medicare coverage was first extended to disability recipients. *See* U.S. Congress, House Comm. on Ways & Means, Rep. on H.R. 1, Social Security Amendments of 1972, H. Rep. 92-231, 92nd Cong., 1st sess. (Washington: GPO 1971).

The 5-consecutive-full-month period is the period under which the affected individual must be disabled before they are eligible for disability benefits. *Id.* at 28; 20 C.F.R. § 404.315(a)(4). The 5-month period applies to both monthly monetary benefits and health-care (Medicare) benefits. Regulations further provide that Medicare coverage starts 24 months after the disabled individual is entitled to

benefits. Consequently, most disabled individuals become eligible for monetary benefits after 5 full consecutive months of disability and able to receive Medicare coverage after 24 (additional) months representing months of benefit entitlement.

That extended 24-month time period was intentionally conservative due to financial (or funding) concerns. *See* U.S. Congress, House Comm. on Ways & Means, Rep. on H.R. 1, Social Security Amendments of 1972, H. Rep. 92-231, 92nd Cong., 1st sess. (Washington: GPO 1971). The House Committee reported that the wait period was created to

> help [] keep program costs within reasonable bounds, avoid overlapping private health insurance protection, particularly in those cases where a disabled worker may continue his membership in a group insurance plan for a period of time following the onset of his disability, and minimize certain administrative problems that might otherwise arise.... Moreover, this approach would provide assurance that the protection will be available to those whose disabilities have proven to be severe and long lasting.

Id. at 67.

Note. There are two exceptions to the 24-month waiting period—individuals with end-stage renal disease may begin Medicare coverage in the 4th month of dialysis, *see* 42 C.F.R. § 406.13, and individuals with amyotrophic lateral sclerosis (also referred to as ALS or Lou Gehrig's disease) may begin coverage at the SSDI onset date, *see* 42 U.S.C. § 423(a)(1)(E).

Many SSDI applicants will have satisfied the waiting periods by the time the SSA rules in their favor. If not, an SSDI recipient will receive notice of Medicare coverage when they are nearing 24 months of their disability eligibility. If the individual opts to take Medicare coverage, they will likely incur a monthly copay for Part B, which they can choose to automatically deduct from their SSDI benefit amount. In 2021, the standard Part B premium amount is $148.50. Medicare.gov, *Part B Costs*, https://www.medicare.gov/your-medicare-costs/part-b-costs (last visited May 18, 2021). Part A benefits typically do not have a premium because the individual has paid Medicare taxes when working.

C. Medicaid [§ 9.99]

While Medicare is solely a federal program, Medicaid is both a federal and state program. The federal program benefits exist regardless of state action. States can opt to expand benefits to additional individuals under the federal income levels for eligibility.

Unlike Medicare, which is funded by payments workers make into the program (similar to many insurance policies), Medicaid is solely a government-funded healthcare program.

Mandatory coverage is extended to certain eligible groups in addition to low-income families, including, but not limited to, qualifying pregnant women, "deemed" newborns, individuals who have been institutionalized since 1973, Supplemental Security Income (SSI) recipients, adult children with disabilities, and children in foster or guardianship care. The full list of mandatory groups may be found online at https://www.medicaid.gov/sites/default/files/2019-12/list-of-eligibility-groups.pdf (last visited May 18, 2021).

Medicaid eligibility may include the following criteria:

- Income level
- Household size
- Disability
- Family status (pregnancy being the primary question)

The Medicaid expansion option arose as part of the ACA. The ACA affords states the ability to provide coverage to most individuals under the age of 65 who meet the income eligibility, as well as children and adults who are at or below 133% of the federal poverty level. States may opt in for this expansion coverage at any time under the ACA's provisions.

If a state opts to accept additional funding under the ACA, applicants may only have to meet income eligibility. Income-eligibility levels, similar to other government programs, have been traditionally based on the modified adjusted gross income (MAGI).

D. Supplemental Security Income (SSI) and Social Security Disability Insurance (SSDI) [§ 9.100]

1. Eligibility and Benefits Overview [§ 9.101]

The two largest Social Security disability programs are SSI and SSDI. Both programs are administered by the SSA.

There are not automatic benefits; instead, individuals who apply must meet certain medical criteria to be deemed eligible for benefits.

The first eligibility criteria for SSI and SSDI are most commonly viewed as a reflection of their funding source:

- SSI is a need-based benefit for individuals who meet designated financial criteria, commonly called an "asset test."
- SSDI is funded by funds collected by the government via FICA withholdings and self-employment taxes. SSDI pays benefits to individuals who meet the criteria (see the table below) and have gained eligibility by working (and contributing to the fund) in the form of work credits, or work quarters.

A snapshot of eligibility criteria and benefits of each program appears below:

	SSI	**SSDI**
How much is the benefit?	The amount received is determined by rule or law and typically changes by a small amount each year. There is that federal payment plus any applicable state amount.	The amount received is determined by FICA contributions, self-employment tax payments, or both. A calculation determines the specific amount.
What are the asset limitations for eligibility?	For individuals, $2,000. For married claimants, $3,000. The value of the resident's owned (and lived-in) home and one car's value are not counted.	There are *no* asset limitations.
What are the income limits for eligibility?	Income limits include earned income *and* unearned income. Unearned income may include *all* other household income.	There is no limit on unearned income or on household income. Note: Some federal pensions are not excluded.
When do benefits begin?	Immediately – there is no waiting period.	Five full months after the disability onset date determined by the SSA.
What health insurance is awarded?	Medicaid. Note: The individual must be eligible for at least one dollar of payment to receive the benefit.	Medicare. There is a copay that may be deducted directly from the benefit.

An applicant (sometimes referred to as a claimant) may be eligible for either program or for both. This is possible because a claimant might have worked steadily for many years but meet the asset test of the SSI program.

Example. Anna, a single woman, worked full time at ABC Factory for 20 years; she stopped work when she had a debilitating stroke. She owns her home and has one car titled in her name. Her care costs and expenses post-stroke are so high that she spends her savings down and cashes out her retirement plan to pay her bills. When she has $2,000 or less in assets, she would be eligible for SSI, and her work history (with earned work credits) make her eligible for SSDI.

A claimant needs to be eligible for at least *one* of the programs in order to continue with the application for benefits; they also may meet eligibility criteria for the other program in the midst of application. As such, it is important to keep in regular contact with claimants to determine whether they should (with your assistance or that of the SSA) submit a second application.

2. Application and Process [§ 9.102]

Applications for SSDI may be completed electronically at https://www.ssa.gov, by phone with the SSA, in person at an SSA office with assistance from office employees, or on paper SSA forms. SSI applications, which are much more detailed due to the asset test, may be done in person, by phone, or on paper; there is currently no ability to complete that application online.

While many people assume that only U.S. citizens may be eligible for disability benefits, some noncitizens might be eligible. These include individuals lawfully admitted to the U.S. for permanent residence, refugees, individuals granted asylum, aliens whose removal is being withheld, and other similar individuals recognized as an eligible classification by the Department of Homeland Security. Individuals who satisfy that criteria then move on to further eligibility criteria and also might be subject to benefit limits or eligibility delays.

The timeline of application covers three phases: initial application, reconsideration, and hearing. The timeline may be quite lengthy—it is not unusual for a claim to take more than two years to reach a hearing. Claimants are frequently frustrated that applicants and representatives have many deadlines for submitting materials, but the SSA has no similar response deadlines. As such, the length of each stage varies.

At the initial stage, the claim is reviewed by a Disability Determination Bureau (DDB) office, typically one that is located in the claimant's geographic area. That office collects medical records for the claimant, reviews that information, and makes a decision. The time to decision is approximately two to six months but can be as long as one year. The denial rate at initial application is very high—the SSA typically states that the denial rate is at least 70%. Upon denial, a claimant has 60 days from the decision date to appeal.

The second stage, reconsideration, is similar to the initial stage in that it also involves a review of medical records. The DDB office will obtain and review additional medical records and documents that the claimant has generated since the initial application, review them, and make a decision. The time to decision is approximately two to six months from requested appeal. The denial rate is higher at reconsideration than at the initial stage—on average, 90% or more are denied. Upon denial, a claimant has 60 days from the decision date to appeal.

The third stage is the SSA hearing. When a hearing is requested (an appeal of the reconsideration denial), the claimant's file is transferred to the local or assigned hearing office for handling. The wait to a hearing is the longest of the three stages. Wait time will depend on the number of files waiting to be heard, the number of ALJs hearing those claims, and how many hearings the ALJ regularly holds. In 2018, the wait was 18–24 months, but it had been as little as 9 months in 2020. The hearing may be held in person, by videoconference, or by phone before an ALJ. Hearings last approximately one hour. Decisions are issued in writing approximately 2–6 months after a hearing. Decisions may be "fully favorable," "partially favorable," or "unfavorable." If a claimant is approved, they will receive a notice of award letter approximately 30–60 days after the date of the ALJ decision. The payment should follow thereafter. Monthly benefits are administered by the claimant's local Social Security office, while back pay (discussed in section 9.104, *infra*) is administered by the SSA.

3. The Five-Step Sequential Evaluation [§ 9.103]

The SSA evaluates claims with a five-step sequential evaluation, meaning the steps are reviewed in order, beginning with number one. If the application fails at a step, the evaluation ceases, and application for benefits is denied. *See* 20 C.F.R. § 404.1520.

1. Is the claimant working?

   If the individual worked in 2020, and earned more than $1,260 gross per month, the claim will be denied. The SSA reviews the previous 12 months of earnings.

2. Is the claimant's medical condition severe enough to affect their work-related activities?

   The SSA, when determining severity, will consider the extent to which the medical impairment(s) interfere with work-related activities. There is also a time component in this step. The SSA considers both the severity and the duration of the impairment: Will the impairment and associated limitations resolve within 12 months after the alleged onset of disability? If yes, the claim will be denied. If the impairment(s) do not substantially interfere with work-related activities, the claim will be denied.

3. What are the disability medical conditions and symptoms that cause the alleged limitations?

   First, the SSA will review the list of "compassionate allowances." This list is created and updated by the SSA with assistance from health-care professionals and researchers; it notes the diagnoses that, by their nature, meet the SSA's definition of disability. Many of these diagnoses may be characterized as terminal, debilitating, or both. Examples include ALS, adult-onset Huntington's disease, early onset Alzheimer's disease, and gallbladder cancer. The list typically contains 60-plus diagnoses and is regularly updated as diagnostic tools and treatments evolve.

If the individual does not have a diagnosis on the compassionate allowance list, the SSA will review the impairments in light of the SSA's list of medical conditions. Called the "listings," the information is arranged by body system. If the condition meets the listing of the condition and its severity, the SSA may find the individual disabled.

Note. The compassionate allowance list does not currently include a mental health diagnosis. Mental health impairments are reviewed under the listings, specifically listing 12.0, which was most recently updated in January 2017 after publication of the *DSM-5*, *supra* § 9.9. The mental health listing cites a diagnosis or condition, as well as criteria under categories A and B, and sometimes C, that must be present. Criteria under A note signs and symptoms of the condition. B criteria address functionality and limitations in light of the signs and symptoms, and C criteria address the seriousness and persistence of the condition.

4. Can the applicant return to their previous work?

If the applicant clears steps 1–3, the SSA recognizes that they have some level of functional limitation. But do the limitations prevent the individual from returning to work? In step 4, the SSA will review whether the claimant can return to work they performed for at least one month in the 15 years before application or alleged onset. If the applicant can perform any of their prior positions in that time period, the claim will be denied.

5. Can the claimant perform any work on a full-time, competitive basis—doing anything, anywhere—without special accommodation?

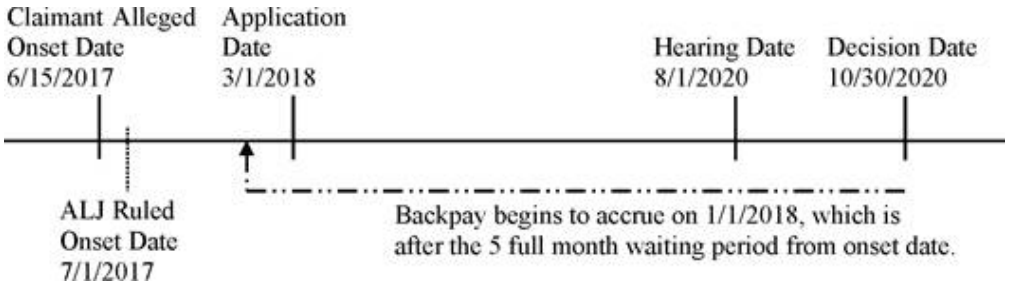
If the applicant can make it all the way this fifth and final step, congratulations are in order. The applicant should prepare to spend most of their time and energy on this step. The SSA considers all medical and vocational evidence, including medical records, vocational rehabilitation records, employment files, functional capacity evaluations, vocational assessments, test results, and affidavits. That information may be evaluated along with the claimant's age, education, skills gained in previous work, and skill transferability.

4. Financial Benefits [§ 9.104]

In addition to the health insurance benefit, SSI and SSDI benefits include monthly benefits, as noted in the table at section 9.101, *supra*; they may also be awarded past benefits, or *back pay*. Back pay benefits are payable for the months of disability after the onset date, and before the decision (or more accurately, payment start date).

Example. Bob applies for SSDI in March 2018, alleging a disability date of June 15, 2017. Bob receives a favorable decision in October 2020 from an ALJ after a hearing was held in August 2020. The ALJ designated Bob's disability-onset date as September 15, 2017. After five full months from the July 2017 onset date, Bob's benefits would begin to accrue; he would receive a sum of back pay for months January 2018 through the decision date. If Bob's benefits are calculated to be $1,000 per month, he would receive approximately $34,000, or 34 months' worth.

This example may be more palatable in pictorial form:


Claimant Alleged Onset Date 6/15/2017
Application Date 3/1/2018
Hearing Date 8/1/2020
Decision Date 10/30/2020
ALJ Ruled Onset Date 7/1/2017
Backpay begins to accrue on 1/1/2018, which is after the 5 full month waiting period from onset date.

Note. If an SSI-only recipient is awarded back pay, they must still continually meet the asset limitations to maintain eligibility. For those individuals, the SSA will release the back pay in smaller amounts on a quarterly basis. That back pay may also be placed into a special-needs or pooled trust.

An ALJ might require a representative payee for disability benefit recipients (also called beneficiaries) who have difficulty managing their money. A payee may be a family member, a friend, or an organization that pays out the benefits for the needs of the beneficiary. Payee appointments are typically handled by the local SSA office that oversees monthly benefits. Representative payees *must* be appointed and *must* keep records of their handling of the beneficiary's money. The SSA periodically requests accounting of benefits to ascertain representative payees' compliance with requirements to serve beneficiaries.

VII. State Programs [§ 9.105]

A. In General [§ 9.106]

Mental health care treatment programs in Wisconsin are regulated under Wis. Admin. Code chs. DHS 34, 35, 36, 40, 61, and 63—largely promulgated by Wis. Stat. chs. 49, 51, and 227.

The Wisconsin Administrative Code chapters relevant to mental health care provision are organized as follows:

Ch. DHS 34	Emergency Mental Health Service Programs
Ch. DHS 35	Outpatient Mental Health Clinics
Ch. DHS 36:	Comprehensive Community Services for Persons With Mental Disorders and Substance-Use Disorders
Ch. DHS 40	Mental Health Day Treatment Services For Children
Ch. DHS 61	Community Mental Health and Developmental Disabilities
Ch. DHS 63	Community Support Programs for Chronically Mentally Ill Persons

Programs provide for either crisis care or ongoing treatment. Emergency treatment is addressed in Wis. Admin. Code ch. DHS 34, while the remaining Administrative Code chapters pertain to nonemergency and ongoing care.

B. Crisis Services [§ 9.107]

Crisis intervention services are provided to those experiencing a mental health emergency, a substance abuse emergency, or both. Wis. Stat. § 51.42(1)(b) requires that every county in Wisconsin provide emergency mental health services to those who need them. *Persons who need those services* are defined as "persons who are experiencing a mental health crisis or are in a situation likely to turn into a mental health crisis if supportive services are not provided." Wis. Admin. Code § DHS 34.01(1). In more rural areas, crisis services often are offered in a multicounty area, which state law allows. Crisis programs must apply for, and be granted, certification in order to operate in compliance with the state's requirements. Wis. Admin. Code § DHS 34.03.

To be certified, programs "shall" do the following:

- Provide immediate evaluation of individuals in crisis;
- Provide emergency services within the county's inpatient or outpatient programs;
- Be organized and recognizable to the extent that the program is clearly identifiable;
- Have staff who are qualified individuals, Wis. Admin. Code § DHS 34.21(3)(b). *Staff* includes psychiatrists, psychologists, social workers, and other mental health personnel; qualification standards also apply to mobile crisis teams;
- Provide telephone services, either by paid staff or trained volunteers; volunteers must be supervised by a qualified staff member;
- Offer some period of in-person service; and
- Offer home evaluation or other off-site service.

Wis. Admin. Code § DHS 34.11.

C. Nonemergency Treatment Services [§ 9.108]

1. In General [§ 9.109]

An individual in crisis who is first evaluated under a program created under Wis. Admin. Code ch. DHS 34 may be referred for further mental health care in the form of inpatient treatment, outpatient programming, or both.

2. Mental Health for Children [§ 9.110]

a. In General [§ 9.111]

The DHS regulates two types of day-services treatment specific to children, under Wis. Admin. Code chapters 40 (mental health day treatment services) and 50 (youth crisis stabilization facilities). Currently, two types of community programs provide youth services.

b. Day Treatment [§ 9.112]

Nonresidential care under Wis. Admin. Code ch. DHS 40 must be prescribed by a physician after assessment. The care prescribed must be part of an overall plan of care developed with the child's family, with a goal of alleviating emotional or behavioral problems resulting from mental illness or similar emotional disturbance. Similar to the dictates for program requirements in Wis. Admin. Code ch. DHS 34, Wis. Admin. Code ch. DHS 40 requires that the program be certified. Wis. Admin. Code ch. DHS 40 only pertains to mental and emotional health concerns—youth substance abuse is specifically addressed in Wis. Admin. Code ch. DHS 75. Unlike the other chapters, Wis. Admin. Code ch. DHS 40 requires "reasonable efforts" to provide care coordination with local education agencies or similar youth programs. Wis. Admin. Code § DHS 40.06.

As with all service programs, there are eligibility requirements for participation. They include the following:

- The child or adolescent has a primary psychiatric diagnosis of mental illness or severe emotional disturbance.
- The child or adolescent is unable to obtain sufficient benefit from a less restrictive treatment program.
- There is a reasonable likelihood that the child or adolescent will benefit from the services offered by the program.
- The child or adolescent meets at least one of the following criteria:
  - Exhibits significant dysfunction in two or more basic domains of life and requires the services offered by the program in order to acquire or restore the skills necessary to perform adequately in those areas;
  - Needs a period of transition from a hospital, residential treatment center, or other institutional setting as part of the process of returning to live in the community; or
  - Experiences a period of acute crisis or other severe stress that may require hospitalization or institutional placement without the level of services provided by the program.
- The child or adolescent meets program criteria regarding source of referral, funding restrictions, age range of children served, and client characteristics for which the program has been specifically designed.
- The child or adolescent's parent or guardian provides written consent, if the child or adolescent is younger than 14 years old.

More information about programs appears online at Wis. DHS, *Mental Health: Youth Day Treatment*, https://www.dhs.wisconsin.gov/mh/day-treatment-youth.htm (last revised Sept. 8, 2020).

Care and services provided to the child are unique per their personalized care plan. Many services may be offered, including the following:

- A structured therapeutic setting;
- Psychiatric or psychological consultation;
- Physician or nurse oversight;
- Individual or family therapy;
- Social work services, including case management, community liaison, family contact, and interagency communication;
- Occupational therapy or structured recreational or vocational services;
- Individual or group counseling by a qualified mental health professional;
- Initial assessment by a qualified mental health professional;
- Development and implementation of an individualized treatment plan;
- Ongoing case reviews;
- Discharge planning; and
- Aftercare follow-up upon completion of the program.

c. Coordinated Services Teams (CST) Initiatives [§ 9.113]

Initially developed in 1989, the goal of CSTs is to develop and provide individualized care plans for children with significant (or complex) behavioral health concerns. The plan includes "wraparound" care from health-care providers, service providers, and family members. This care model aims to keep children in their homes while providing care and support to the child, but also extends services to children in institutional settings who wish to return home or who need community-based services. CST initiatives were available in 68 Wisconsin counties and 11 tribal nations at the time of publication and are most frequently based in the relevant community's department of

health or human services. *See* Wis. DHS, *Coordinated Services Teams (CST) Initiatives*, https://www.dhs.wisconsin.gov/cst/index.htm (last revised Jan. 22, 2021).

3. Community Programs and Services for Adults [§ 9.114]

There are, at any given time, multiple programs in Wisconsin that provide services to adults with mental illnesses. All must follow the dictates of the relevant laws and regulations, but they change over time as programs are deemed inefficient, underfunded, or unqualified. At the time of publication, the following community-based programs and services are deemed the "core" of the Wisconsin mental health system:

- Community Recovery Services (CRS)
  In this program, adults living with mental illness can receive the following types of support with the goal of improving their quality of life:
  - *Community living supportive services*: Assistance and support for activities of daily living including cooking, chores, personal care, shopping, and medication reminders. The individual may also be helped with parenting, crisis coping skills, development of interpersonal skills, and emotional regulation.
  - *Peer support services*: Assistance and recovery efforts provided by an individual with lived experience of mental illness.
  - *Supported employment services*: Services extended to individuals who want to obtain and sustain employment. These services are provided by the individual's local Department of Vocational Rehabilitation (DVR) office or "job center." The DVR is able to provide assessments to determine which limitations might affect employment, offer training and education services, and provide supported employment opportunities.

  Practice Tip. For individuals considering application for Social Security disability benefits, seeking assistance from the DVR may be very beneficial. The SSA regularly takes detailed notes when they agree to assist an individual. If the efforts are unsuccessful, or if it is determined that the individual may only be able to sustain accommodated employment, the DVR records may be requested and supplied to the SSA as an exhibit in a disability application. Assessments are frequently performed by professionals trained in vocational rehabilitation—these same individuals often serve as experts in disability hearings, and their opinions may be both practical and valuable in reviewing the disability applicant's functional limitations in competitive work settings.

- Community Support Programs (CSPs)
  CSPs (not offered in all areas) are programs that supply services to adults living with persistent illness who struggle with daily living and are at risk of a pattern of institutional care.

- Comprehensive Community Services (CCS)
  CCS programs are not yet available in all counties and tribal nations but are being increasingly added due to their success. Individuals who qualify for CCS programs are provided with an individualized care plan with coordinated support from their mental health care providers and peer support specialists. Care team members regularly convene to discuss the individual's progress, needs, goals, and need for other (or additional) services. Individuals in these programs might have substance abuse concerns in addition to mental illness that if left untreated may result in inpatient care.

  Practice Tip. CCS programs have quickly gained a reputation for providing efficient and beneficial care to individuals. This appears to be largely due to their team approach with regular communication, as well as regular personalized care. Many participants benefit through CCS programs, specifically by learning to better recognize and address their health concerns. As this program has grown, there are now waiting lists for CCS services. Clients who might benefit from CCS services should speak to their primary care provider for a referral.

- Preadmission Screening and Resident Review (PASRR)
  PASRR is a federal requirement established in 1992 that seeks to identify individuals in nursing homes who might have a mental illness or an intellectual disability. Once identified, those individuals are then evaluated further to determine necessary care and services. There are two levels of screening. The first can be conducted by social workers, hospital discharge staff, or nursing facility staff. The second level screening is, as of spring 2020, processed by Behavioral Consulting Services. Importantly, all residents in (and applicants to) Medicaid-certified skilled nursing facilities must be assessed per PASRR. Regulations relevant to PASRR are contained within 42 C.F.R. pts. 405, 431, 433, and 483.

- Peer-Run Respites

As of 2020, there are three peer-run respite facilities funded by the DHS; they are located in Appleton, Madison, and Menomonie. Peer-run respites are temporary, short stays in a supportive housing environment. The goal is to provide a supportive environment in times of increased stress or symptoms for individuals with mental illness, substance abuse concerns, or both. No physician is present in these facilities, and no medication management is provided. Instead, staff with shared history interact with guests who are self-referred. Guests are free to attend work, school, and family functions while staying at the respite facility. There is no cost to the guests.

- Peer Specialists
  Wisconsin currently certifies two categories of peer specialists—peer specialists and parent peer specialists. To become certified, an individual must attend training (typically held in person) and pass an exam. Many of the programs listed in these materials use peer specialists as a component of their services.

- Winnebago Mental Health Institute (WMHI) and Mendota Mental Health Institute
  Located near Oshkosh, WMHI is a psychiatric inpatient facility funded by the DHS. As of 2014, the facility addresses the needs of civil patients and female forensic (criminal) patients, and patients may be transported from long distances for care at WMHI. Mendota Mental Health Institute also is funded by the DHS and is located in Madison. Since 2014, Mendota Mental Health Institute has treated only male forensic (criminal) patients. *See* Wis. DHS, *MMHI: Forensic Services*, https://www.dhs.wisconsin.gov/mmhi/forensic.htm (last revised Sept. 8, 2020).

VIII. Conclusion [§ 9.115]

In summary, there are a number of Wisconsin-funded programs and Wisconsin-administered federally funded programs for individuals with mental illness. Health care for these individuals should be of primary concern for attorneys working with these individuals, and attorneys should be aware of the concept of parity and that the health-care industry is continually changing. Wisconsin agencies have been working tirelessly to provide emotional stability, life skills, employment, food security, financial assistance, and housing to affected individuals. In addition to participation in these programs, individuals may seek veteran's benefits, worker's compensation benefits, or Social Security disability benefits. There are time concerns associated with these programs: If you believe an individual might be eligible for one or more of them, please encourage the person to consult with a knowledgeable attorney as soon as they are able.

Chapter 10
Treatment Courts

Hon. Cynthia M. Davis

I. Scope of Chapter [§ 10.1]

As more jurisdictions integrate treatment court programs into their justice systems, treatment courts continue to gain notoriety on national and local levels. People might have a general understanding of treatment courts from hearing the inspiring stories of participants who have completely transformed their lives by treating their addiction and mental health concerns, healing from their trauma, changing their way of thinking, leaving unhealthy relationships, and obtaining a stable residence and employment. Judges and attorneys also have their own stories of how treatment courts have transformed their lives, with some never wanting to go back to court as usual. However, unless one practices in the area, the concept of treatment courts remains somewhat a distant, ideological construct. The purpose of this chapter is to provide an overview of treatment courts and how they function, thereby giving attorneys the necessary knowledge and tools to practice in a treatment court. The chapter focuses on adult drug treatment courts, which are the most widely researched type of treatment court due to their longevity, and other similar treatment courts involving a criminal docket and could serve as a guide for communities that wish to establish their own successful treatment courts.[9]

Sections 10.2–.11, *infra*, describe the general concept and various types of treatment courts. Sections 10.12–.15, *infra*, provide a brief history of treatments courts, both nationwide and locally in Wisconsin. Sections 10.16–.18, *infra*, set forth what have been called the Ten Key Components of a treatment court and related best practices. Sections 10.19–.23, *infra*, describe the various types of eligibility criteria for treatment courts and how participants are selected for treatment court programs. Sections 10.24–.32, *infra*, describe the various types of adjudication models for treatment courts operating with a criminal docket. Sections 10.33–.37, *infra*, detail the roles and responsibilities of treatment court team members. Sections 10.38–.41, *infra*, describe in more detail the role of the treatment court judge. Sections 10.42–.47, *infra*, discuss specific legal considerations that arise in treatment courts. Section 10.48, *infra*, concludes with comments about the future of treatment courts. Section 10.49, *infra*, is an appendix with additional resources.

II. What is a Treatment Court? [§ 10.2]

A. In General [§ 10.3]

A treatment court is a "problem-solving court" that takes an alternative approach to the traditional, adversarial court process by implementing a coordinated response to participants who are dependent on alcohol and other drugs or are living with severe or persistent mental illness or organic brain disorders. Wis. Ass'n of Treatment Ct. Pros., *Wisconsin Treatment Court Standards* 1 (Apr. 2014), http://www.watcp.org/wp-content/uploads/2014/05/WATCP_Standards_April-2014.pdf [hereinafter *Wisconsin Treatment Court Standards* 2014]. Participation in treatment courts requires the voluntary consent of the justice-involved individual, and the coordinated response of treatment courts requires collaboration among their team members, which typically include the judge, treatment court coordinator, prosecutor, defense counsel, law enforcement, treatment providers, case managers, evaluators, medical experts, and probation authorities. *Id.*

Treatment courts are based on the concept of *therapeutic jurisprudence*, which is defined as the "social scientific study of the law's effects on people's psychological and physical well-being." Arthur J. Lurigio, *The First 20 Years of Drug Treatment Courts: A Brief Description of Their History and Impact*, 72 Fed. Prob. 13, 14 (June 2008). Therapeutic jurisprudence recognizes that the law has profound consequences for an individual and, therefore, "courts can be change agents that exert a therapeutic (or non-therapeutic) influence through their procedures, rulings and dispositions." *Id.*

B. Goal of Treatment Courts [§ 10.4]

The goal of most treatment courts is to engage participants in treatment under court oversight to successfully address the addiction or mental health instability and to break the cycle of recidivism. *Wisconsin Treatment Court Standards* 2014, *supra* § 10.3, at 1. Treatment courts require frequent review hearings in front of a judge, frequent drug testing, regular treatment with qualified providers, medication monitoring and compliance (if applicable), and a variety of sanctions and incentives to motivate participants to change their behavior, leading to healthier lifestyles, restored relationships and lower recidivism. Nat'l Ctr. for State Cts., *Effective Justice Strategies in Wisconsin, A Report of Findings and Recommendations* viii (2012), https://www.wicourts.gov/courts/programs/docs/ejsreport.pdf.

C. Types of Treatment Courts [§ 10.5]

1. In General [§ 10.6]

A variety of treatment courts exist, including the following categories: adult drug, veterans, OWI (operating while under the influence of an intoxicant), mental health, co-occurring disorders, hybrid OWI and drug, juvenile drug, family dependency, tribal healing to wellness, and healthy infants. Wis. Ass'n of Treatment Ct. Pros., *Wisconsin Treatment Court Standards* i (2018), https://www.watcp.org/wp-content/uploads/2018/12/FINAL-WI-Treatment-Court-Standards-2018.pdf [hereinafter *Wisconsin Treatment Court Standards* 2018]. Adult drug, mental health, veterans, OWI, co-occurring disorders, and hybrid OWI-drug courts are all criminal court calendars in which participants are diverted from the traditional, adversarial criminal process and are given an opportunity to address their rehabilitative needs in a judicially supervised setting. The following sections of this chapter are devoted mainly to treatment courts that involve a criminal docket.

2. Adult Treatment Courts with a Criminal Docket [§ 10.7]

Adult drug treatment courts focus on maintaining the participant's sobriety by requiring engagement in clinically recommended treatment. *Wisconsin Treatment Court Standards* 2018, *supra* § 10.6, at iii. The focus of a mental health court is on medication monitoring and compliance and engagement in community-based treatment and services for participants with mental health disorders. *Id.* at v. OWI treatment court is almost always a post-conviction court, composed solely of participants who have been convicted of operating while under the influence of an intoxicant; the court addresses the participant's substance use needs and the root causes of impaired driving. *Id.* A veterans treatment court is a hybrid of adult drug and mental health courts that serves military veterans and sometimes active duty personnel. *Id.* at vii. A co-occurring disorders treatment court is a hybrid of an adult drug court and a mental health court and serves the needs of participants with co-occurring substance use and mental health disorders. A hybrid OWI-drug treatment court is a hybrid of an adult drug court and an OWI court and serves those with substance use disorders, but it is also specially structured to meet the needs of OWI offenders. *Id.* at iv. Sections 10.24–.32, *infra*, contain a more detailed discussion of the different types of adjudication models employed by treatment courts with a criminal docket.

3. Family Dependency and Juvenile Drug Treatment Courts [§ 10.8]

A family dependency treatment court is a juvenile or family court docket for cases of child abuse or neglect in which parental substance use is a contributing factor. *Wisconsin Treatment Court Standards* 2018, *supra* § 10.6, at iv. The court's goal is to provide safe and stable homes for children while aiding parents or guardians with their long-term recovery to enhance the possibility of family reunification within the mandatory, legal timeframes. *Id.* A juvenile drug treatment court is a specialized docket of delinquency cases involving participants who have problems with alcohol or other drugs. *Id.*

4. Tribal Healing to Wellness Courts [§ 10.9]

A tribal healing to wellness court is a component of the tribal justice system that provides Native American communities the opportunity to address substance use disorders among participants through comprehensive supervision, drug testing, treatment services, immediate sanctions and incentives, team-based case management, and community support. *Wisconsin Treatment Court Standards* 2018, *supra* § 10.6, at vii. In addition to the judge, attorneys, and treatment professionals, the team also consists of tribal elders and healers. *Id.* The court is tailored to utilize the unique strengths and history of each tribe, and the court's goal is to restore the participant as a contributing member of the tribal community. *Id.*

5. Healthy Infants Courts [§ 10.10]

Milwaukee County's Healthy Infants Court, the first of its kind in Wisconsin, applies the science of early childhood development while minimizing early childhood trauma in infants who have been removed from their home pursuant to a child in need of protection or services (CHIPS) order because of child abuse or neglect. Chuck Quirmbach, *Milwaukee County Starting a Healthy Infants Court*, Wis. Pub. Radio (May 4, 2016), https://www.wpr.org/milwaukee-county-starting-healthy-infants-court. The treatment court team works with the infant's appointed caregiver to connect the infant to services that will help foster healthy relationships and promote healthy development. *Id.*

6. Other Courts [§ 10.11]

As treatment courts continue to gain notoriety, other types of problem-solving courts continue to emerge, including the following: reentry, domestic violence, homelessness, gambling, truancy, and prostitution. Douglas B. Marlowe, Carolyn D. Hardin & Carson L. Fox, Nat'l Drug Ct. Inst., *Painting the Current Picture*: *A National Report on Drug Courts and Other Problem Solving Courts in the United States* 12–13 (June 2016), https://www.ndci.org/wp-content/uploads/2016/05/Painting-the-Current-Picture-2016.pdf [hereinafter Marlowe et al., *Painting the Current Picture*].

III. Brief History of Treatment Courts and Current Landscape in Wisconsin [§ 10.12]

A. Early Treatment Courts [§ 10.13]

Dade County's felony drug court in Miami, Florida, which began hearing cases in 1989 and is touted as the first treatment court in the nation, has been highly regarded for its collaboration among team members. Arthur J. Lurigio, *The First 20 Years of Drug Treatment Courts: A Brief Description of Their History and Impact*, 72 Fed. Prob. 14, 15 (June 2008). This drug treatment court, along with the many others that followed, was created out of a recognition that the traditional justice system was not working for individuals with substance use disorders. Imprisonment was not effective in deterring criminal behavior or rehabilitating justice-involved individuals, and a new paradigm was needed to stop the cycle of recidivism. Jeffrey Tauber, Nat'l Drug Ct. Inst., *Drug Courts: Back to the Future*, *The Drug Court Judicial Benchbook* § 1.2 (2017), https://www.ndci.org/wp-content/uploads/2016/05/Judicial-Benchbook-2017-Update.pdf.

A U.S. Supreme Court case, *Robinson v. California*, 370 U.S. 660 (1962), laid the groundwork for drug treatment courts. *Drug Court Judicial Benchbook*, *supra*, § 1.3. The *Robinson* Court recognized that a narcotics addiction was an illness. *Robinson*, 370 U.S. at 666. Since that ruling, treatment, rather than punishment, became more acceptable in dealing with persons struggling with a drug addiction. *Drug Court Judicial Benchbook*, *supra*, § 1.3.

B. Increased Numbers of Treatment Courts [§ 10.14]

As of December 31, 2014, there were 3,057 drug courts and 1,311 other problem-solving courts in the United States. Marlowe et al., *Painting the Current Picture*, *supra* § 10.11, at 7, 9. Furthermore, 13 other countries have also adopted the drug court model. 1 Nat'l Ass'n

of Drug Ct. Pros., *Adult Drug Court Best Practice Standards* vi (2018), https://www.nadcp.org/wp-content/uploads/2018/12/Adult-Drug-Court-Best-Practice-Standards-Volume-I-Text-Revision-December-2018-1.pdf [hereinafter *Adult Drug Court Best Practice Standards* 2018].

Dane County's adult drug treatment court, established in 1996, was Wisconsin's first treatment court. *Wisconsin Treatment Court Standards* 2018, *supra* § 10.6, at i. The number of treatment courts in Wisconsin has grown significantly since then. In 2011, Wisconsin had a total of 48 treatment courts with the following breakdown: 24 adult drug courts, 9 OWI courts, 2 mental health courts, 6 veterans courts, 2 hybrid courts, 4 juvenile drug courts, and 1 family court. Nat'l Ctr. for State Cts., *Effective Justice Strategies in Wisconsin, A Report of Findings and Recommendations* viii, (2012), https://www.wicourts.gov/courts/programs/docs/ejsreport.pdf. While the numbers continue to fluctuate, in 2020 Wisconsin had 99 treatment courts, categorized as follows: 40 adult drug courts, 19 OWI courts, 5 mental health courts (in addition to Milwaukee County's Healthy Infants Court), 9 veterans courts, 11 hybrid OWI-drug courts, 4 tribal healing to wellness courts, and 10 family drug courts. These numbers were reported by Wisconsin's Statewide Problem-Solving Court Coordinator from the Office of Court Operations. The local program map on the Criminal Coordinating Justice Council website illustrates the breakdown of treatment courts by type and county, and updates are available upon request. Crim. Just. Coordinating Council, *Local Program Map*, https://cjcc.doj.wi.gov/local-program-map (last visited Apr. 29, 2021).

Wisconsin's ability to expand its treatment court programs has been made possible in two ways. First, courts have applied for and received funding from federal grants. Second, state legislation, passed in 2005, established treatment alternative and diversion (TAD) grants to counties. *See* 2005 Wis. Act 25. The purpose of giving the TAD grants to counties is "to enable them to establish and operate programs, including suspended and deferred prosecution programs and programs based on principles of restorative justice, that provide alternatives to prosecution and incarceration for criminal offenders who abuse alcohol or other drugs." Wis. Stat. § 165.95(2); Thomas J. Walsh, *In the Crosshairs: Heroin's Impact on Wisconsin's Criminal Justice System*, Wis. Law., Jan. 2016, at 33–34. Funding for the TAD grants began in 2007 with approximately $700,000 allocated to seven counties and tribes. Wis. Dep't of Just., Bureau of Just. Info. & Analysis, *Treatment Alternatives and Diversion (TAD) Program 2014-2018, Participant Outcome Summary and Cost-Benefit Report* 9, https://cjcc.doj.wi.gov/sites/default/files/article_files/TAD%20Participant%20Outcome%20Summary%20and%20Cost-Benefit%20Analysis%20Report.pdf [hereinafter *TAD Program 2014-2018*]. As of 2020, that funding had grown to almost $7.2 million annually with allocations to 53 counties and 2 tribes in Wisconsin. Crim. Just. Coordinating Council, *Treatment Alternatives and Diversion Program Report* 2020, at 1, https://cjcc.doj.wi.gov/sites/default/files/article_files/CJCC%20TAD%20Program%20Report%202020.pdf [hereinafter Crim. Just. Coordinating Council, *TAD Program Report* 2020]. The TAD program currently funds a total of 57 treatment courts and 29 diversion programs. *Id.*

C. Benefits of Treatment Courts [§ 10.15]

Wisconsin, and the United States as a whole for that matter, will likely continue to see an increase in treatment courts as the positive outcomes become more researched and widely touted. The oft-cited benefits of a treatment court include increased public safety because of lower rates of recidivism by participants and cost-savings to taxpayers because of lower recidivism and decreased use of incarceration. Douglas B. Marlowe & William G. Meyer, Nat'l Drug Ct. Inst., *Introduction*, *The Drug Court Judicial Benchbook* 1 (2017). Research has shown that in Wisconsin, for every $1.00 spent in TAD grant funding on treatment courts, there is a savings of $4.17 to the criminal justice system. *TAD Program 2014-2018*, *supra* § 10.14, at 4. Research in Wisconsin also shows that the recidivism rates for participants who completed a treatment court program were much lower than the rates for participants who were terminated from a treatment court program. *Id.* at 2–3. For example, within three years after discharge, treatment court graduates in 2014–15 had a 43.2% recidivism rate at arrest compared to a 61.4 % recidivism rate at arrest for those participants who were terminated from the program. *Id.* In short, research shows that treatment courts work.

IV. Key Components of a Treatment Court and Related Best Practice Standards [§ 10.16]

A. Ten Key Components [§ 10.17]

One of the benefits of practicing in the area of drug treatment courts is that, unlike any other field of law, such courts have been widely researched in an attempt to develop evidence-based practices that lead to successful outcomes. William Ray Price, Nat'l Drug Ct. Inst., *Preface*, *The Drug Court Judicial Benchbook* xiii (2017). Such research is now also being tested, and additional research is being conducted, on other types of treatment courts to promote successful outcomes. Marlowe et al., *Painting the Current Picture*, *supra* § 10.11, at 14. More than two decades of research reveal that adherence to the Ten Key Components of a drug treatment court is necessary for achieving positive outcomes, such as higher graduation rates of participants, lower recidivism, and cost savings. William Ray Price, Nat'l Drug Ct. Inst., *Preface*, *The Drug Court Judicial Benchbook* xiii (2017). Originally published in 1997 by the National Association of Drug Court Professionals in collaboration with the Bureau of Justice Assistance, the Ten Key Components have been applied in the context of

drug treatment courts and also have been adapted to other types of treatment courts, such as those focusing on mental health and veterans. *Wisconsin Treatment Court Standards* 2014, *supra* § 10.3, at 1.

The Ten Key Components are the following:

1. Drug courts integrate alcohol and other drug treatment services with justice system case processing;
2. Using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights;
3. Eligible participants are identified early and promptly placed in the drug court program;
4. Drug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services;
5. Abstinence is monitored by frequent alcohol and other drug testing;
6. A coordinated strategy governs drug court responses to participants' compliance;
7. Ongoing judicial interaction with each drug court participant is essential;
8. Monitoring and evaluation measure the achievement of program goals and gauge effectiveness;
9. Continuing interdisciplinary education promotes effective drug court planning, implementation, and operations; and
10. Forging partnerships among drug courts, public agencies, and community-based organizations generates local support and enhances drug court program effectiveness.

Nat'l Ass'n of Drug Ct. Pros. (Drug Ct. Standards Comm.) & Bureau of Just. Assistance, *Defining Drug Courts: The Key Components* iii (reprinted Oct. 2004), https://www.ncjrs.gov/pdffiles1/bja/205621.pdf [hereinafter *Defining Drug Courts*].

While most of these components are relatively straightforward, many of them are explored in more detail in the following sections.

B. Other Best Practice Standards and Guidelines [§ 10.18]

Organizations such as the National Association of Drug Court Professionals (NADCP) and the Wisconsin Association of Treatment Court Professionals (WATCP) have used the Ten Key Components to develop their own recommended best practice standards for treatment courts. *Wisconsin Treatment Court Standards* 2014, *supra* § 10.3, at 1; *Adult Drug Court Best Practice Standards* 2018, *supra* § 10.14, at 1. Best practice standards and guidelines have also been established for specific types of treatment courts other than drug treatment courts, such as the following:

- *Family treatment court*. *See* Center for Children & Fam. Futures & Nat'l Ass'n of Drug Ct. Pros., *Family Treatment Court Best Practice Standards*, https://www.nadcp.org/wp-content/uploads/2019/09/Family-Treatment-Court-Best-Practice-Standards_Final2.pdf (last visited Apr. 29, 2021).
- *Juvenile drug treatment court. See* U.S. Dep't of Just., Office of Juv. Just. & Delinq. Prot., *Juvenile Drug Treatment Court Guidelines* (Dec. 2016), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/250368.pdf.
- *OWI treatment court. See* Nat'l Ctr. for DWI Cts., *The Ten Guiding Principles of DWI Courts*, https://www.dwicourts.org/wp-content/uploads/Guiding_Principles_of_DWI_Court_0.pdf (last visited Mar. 11, 2021).
- *Mental health treatment court. See* Bureau of Just. Assistance & Council of State Gov'ts Just. Ctr., *Improving Responses to People with Mental Illnesses: The Essential Elements of a Mental Health Court* (2007), https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/MHC_Essential_Elements.pdf [hereinafter *Improving Responses to People with Mental Illnesses*].

Any jurisdiction that is planning to implement a treatment court must consult the applicable best practice standards or guidelines because all treatment courts are expected to adhere to them. In fact, treatment courts in receipt of state TAD or federal grants are evaluated according to their compliance with best practice standards.

V. Eligibility Criteria [§ 10.19]

A. In General [§ 10.20]

One of the key components of a treatment court is that eligible participants are identified early and promptly placed in the program. This early identification and prompt placement allow the judicial system to capitalize on the window of opportunity right after arrest, during which justice-involved individuals may be more likely to acknowledge the effects of their substance abusing behavior and to take advantage of alcohol and other drug (AOD) use treatment. *Defining Drug Courts*, *supra* § 10.17, at 5. Research suggests that, to achieve the

best outcomes, admission into the treatment court programs should occur within 50 days from the time of the arrest or the other triggering event. *Wisconsin Treatment Court Standards* 2018, *supra* § 10.6, at 15.

Ideally, criminal justice officials, such as pretrial services, are designated to screen cases and identify potential treatment court participants. *Defining Drug Courts*, *supra* § 10.17, at 5. Most treatment courts encourage and allow anyone to make the referral, whether that be the defense attorney, the defendant, the prosecutor, the judge, the treatment court coordinator, the victim, or anyone else who has a stake in the process. *Wisconsin Treatment Court Standards* 2018, *supra* § 10.6, at 15. Regardless of the type of treatment court, most programs require an individual to satisfy eligibility criteria in two separate categories: (1) legal and (2) risk and needs assessment.

B. Legal Criteria [§ 10.21]

Most treatment court programs have a list of offenses that automatically disqualify an individual. Typical exclusionary offenses include felony sex offenses, felony firearms offenses, certain crimes of violence, certain drug-dealing offenses, and public welfare-entitlement charges. *See, e.g.*, *Milwaukee County Adult Drug Court Policy & Procedures Manual* (unpublished). Many of the decisions on exclusionary offenses are driven by the funding limitations dictated by the TAD or federal grants. However, as more research is conducted on the rationale for excluding certain offenses, treatment courts are encouraged to reevaluate their lists of disqualifying offenses and pay more attention to the disparate effects their eligibility criteria have on people of certain races. *Adult Drug Court Best Practice Standards* 2018, *supra* § 10.14, at 7, 13. This issue is discussed in more detail in section 10.23, *infra*.

In addition to certain exclusionary offenses, treatment court programs consider victim input, location of residence, and other legal criteria. *Wisconsin Treatment Court Standards* 2018, *supra* § 10.6, at 16. While a person's eligibility for treatment court does not depend on the victim's consent, prosecutors must listen to the victims' input, and they usually factor such input into their decisions. *See* Wis. Const. art. I, § 9m(2)(h); Wis. Stat. §§ 950.04(1v)(j), 971.095(2). Treatment courts vary regarding a residency requirement for the participant. Ideally, the participant lives in the county in which the case was brought so that the participant may access county-funded services and be available for drug testing. Acting under the authority of a judicial transfer of the case, some treatment courts accept participants who reside in their county but who commit crimes in other counties.

For veterans treatment court, the participant must be a U.S. military veteran. County residency requirements are not as relevant for this court as long as the participant is eligible for Veterans Affairs (VA) benefits and a VA medical center is available. While uniformity does not exist nationwide, some courts impose additional requirements, such as accepting only veterans who received an honorable discharge from the armed forces, who served on active duty in a combat zone, or whose criminal offense has a nexus with their military experiences. Benjamin Pomerance, *Rational Justice: Equal Protection Problems amid Veterans Treatment Court Eligibility Categorizations*, 97 Or. L. Rev. 425, 434 (2019).

While uniformity does not exist among mental health treatment courts, often these courts require some sort of nexus between the individual's mental illness and the criminal behavior. Nancy Wolff et al., *Mental Health Courts and Their Selection Processes: Modeling Variation for Consistency*, 35(5) Law Hum. Behav. 7 (Oct. 2011). Best practices for mental health courts recommend such nexus. *Improving Responses to People with Mental Illnesses*, *supra* § 10.18, at 2. Notably, mental health courts are not available to individuals who are pleading, or have been found, not guilty by reason of mental disease or defect under Wis. Stat. § 971.15 or who are currently not competent to proceed under Wis. Stat. § 971.13.

Treatment courts in Wisconsin vary as to who is the initial gatekeeper for referrals regarding the legal criteria. Regardless of who acts as the initial gatekeeper, the treatment court should have a process for the referring party to appeal the ineligibility determination, thereby requiring the entire treatment court team, including the judge, to review the initial decision. Typically, both the judge and the prosecutor have an ability to veto an applicant found eligible by the initial gatekeeper.

C. Risk and Needs Assessment [§ 10.22]

Participants must also meet risk-and-needs-assessment criteria. Because research shows that drug treatment court is most effective for individuals who are considered "high risk" and "high need," the common understanding is that treatment courts should therefore target "high risk, high need" individuals. Carolyn Hardin & Carson Fox, Nat'l Drug Ct. Inst., *Getting Started*, *The Drug Court Judicial Benchbook* § 2.13 (2017) [hereinafter Hardin & Fox, *Getting Started*]. While research is ongoing, preliminary research results suggest that other treatment courts, such as those addressing OWI, juveniles, veterans, families, and mental health, may also be most effective when targeting high-risk and high-need individuals. Marlowe et al., *Painting the Current Picture*, *supra* § 10.11, at 19, 22, 24, 27, 29.

Notably, risk does not refer to risk for violence or dangerousness but refers to prognostic risk. Hardin & Fox, *Getting Started*, *supra*, § 2.13. Prognostic risk corresponds to "those characteristics of offenders that generally predict poorer outcomes in standard rehabilitation

programs [such as] an early onset of substance abuse or delinquency, prior felony convictions, previously unsuccessful attempts at treatment, a coexisting diagnosis of antisocial personality disorder (APD), and a preponderance of antisocial peers or affiliations." *Id.* In other words, prognostic risk refers to the risk of "failing to respond to standard interventions." *Id.*

High need refers to high criminogenic need. *Id.* Criminogenic need corresponds to "clinical disorders or functional impairments that, if ameliorated, substantially reduce the likelihood of continued engagement in crime [such as] drug or alcohol addiction and serious psychiatric disorders." *Id.* For traditional drug and OWI courts, such high criminogenic need corresponds to a moderate to severe substance use disorder, whereas for mental health treatment courts, the high criminogenic need corresponds to a moderate to severe mental health disorder.

While targeting high-risk, high-need individuals leads to the most effective results, treatment court programs are not always able to target such individuals for various reasons, including statutory restrictions, lack of resources, and lack of support from the prosecution or other community stakeholders. *Adult Drug Court Best Practice Standards* 2018, *supra* § 10.14, at 6. In those situations, the lower-risk, lower-need individuals may be targeted and the program should be modified to provide less intense court supervision and less intense treatment. *Id.* In some scenarios, a treatment court program may attempt to target all types of risks and needs, in which case the program would provide different tracks based on the risk and needs of the individual. *Id.* at 7. Section 10.32, *infra*, discusses tips for developing different tracks. Notably, however, while drug treatment courts have proven to be equally effective in reducing crime and drug use among a wide range of offenders, their cost-effectiveness may be reduced by focusing on low-risk participants. Shelli B. Rossman & Janine M. Zweig, Nat'l Ass'n of Drug Ct. Pros., *The Multi-Site Adult Drug Court Evaluation* (May 2012), https://www.ndci.org/wp-content/uploads/2018/09/Multisite-Adult-Drug-Court-Evaluation-NADCP.pdf.

Assessing objectively the risk and needs of an individual requires both validated risk assessment and clinical assessment tools. *Adult Drug Court Best Practice Standards* 2018, *supra* § 10.14, at 5. When choosing the particular assessment tools, treatment courts must be mindful that most assessment tools have been validated using samples comprising mainly Caucasian males; therefore, treatment courts are encouraged to seek tools that have been validated for additional groups as well, such as females, minorities, and members of other demographic subgroups. *Id.* at 13. The Addictions, Drug & Alcohol Institute at the University of Washington has an online catalog of screening and assessment tools created for use in substance use disorder treatment, available at http://lib.adai.washington.edu/instruments/ (last visited Apr. 29, 2021).

The purpose of a risk assessment tool is to predict criminal recidivism or failure of community supervision and to determine the appropriate level of court supervision. *Adult Drug Court Best Practice Standards* 2018, *supra* § 10.14, at 5, 7. A majority of treatment courts in Wisconsin use the COMPAS assessment. Northpointe, *Practitioners Guide to COMPAS* (Aug. 17, 2012), http://www.northpointeinc.com/files/technical_documents/FieldGuide2_081412.pdf. Examples of other validated risk assessment tools that Milwaukee County uses in its adult drug treatment court and veterans treatment court are the Level of Service Inventory, *LSI-R: Level of Services Inventory-Revised, Participant Manual*, https://dhs.sd.gov/drs/recorded_videos/training/lsi-r/doc/LSI-R%20introductory%20training%20Participant%20Manual.pdf (last visited Apr. 29, 2021), and Ohio's universal assessment system, Ohio Dep't of Rehab. & Corr., *Ohio Risk Assessment System*, https://www.drc.ohio.gov/oras (last visited Apr. 29, 2021), respectively.

Specialty risk tools that are used for specific populations, such as OWI offenders, include the Impaired Driver Assessment, *see* Shane Wolf, *Development and Use of the Impaired Driving Assessment* (Apr. 23, 2016), Nat'l Ctr. for DWI Cts., https://www.dwicourts.org/e-learning/development-and-use-of-the-impaired-driving-assessment/, and the Computerized Assessment and Referral System (CARS), *CARS—Screening and Assessment Tool*, Responsibility.org, https://www.responsibility.org/end-drunk-driving/initiatives/cars-dui-assessment-project/ (last visited Apr. 29, 2021). Such specialty risk tools were created out of a recognition that traditional risk assessments were underreporting risk for OWI offenders, leading to inaccurate assessments. *CARS—Screening and Assessment Tool*, Responsibility.org, https://www.responsibility.org/end-drunk-driving/initiatives/cars-dui-assessment-project/ (last visited Apr. 29, 2021).

The purpose of a clinical assessment tool is to evaluate the formal diagnostic symptoms of an individual and to determine the appropriate level of treatment and services. *Adult Drug Court Best Practice Standards* 2018, *supra* § 10.14, at 6, 7. Ideally, the clinical assessment tool evaluates the level of the individual's substance use disorder as well as the level of behavioral health concerns. In Milwaukee County, for example, the adult drug treatment court uses the Community Access to Recovery Services Comprehensive Assessment Tool, which is a tool the Milwaukee County Behavioral Health Division created based on the ASAM (American Society of Addiction Medicine) criteria to determine the appropriate level of care necessary to address the participant's treatment needs.

For those jurisdictions with both a drug treatment court and a mental health treatment court, the results of the clinical assessment should help determine whether an individual is more appropriate for one court over the other. For those jurisdictions without both types of courts or without a hybrid co-occurring disorders treatment court, the existing treatment court is encouraged to still admit an individual with co-occurring substance use and mental health disorders, assuming adequate services are available. *Id.* at 8.

Mental health treatment courts vary as to the type of mental health diagnoses they will accept, with some accepting most types of mental illness, along with organic brain damage and developmental disabilities, and others accepting only specific types of mental illness such as schizophrenia, schizoaffective disorder, and bipolar disorder. Nancy Wolff et al., *Mental Health Courts and Their Selection Processes: Modeling Variation for Consistency*, 35(5) Law & Hum. Behav. 6 (Oct. 2011). Mental health treatment courts that have access to a psychiatrist typically require a psychiatric evaluation or mental health assessment to determine eligibility, while other mental health treatment courts, depending on their resources, will accept a diagnosis from a review of case records. *Id.*

Treatment courts vary as to who makes the eligibility determination once the risk and needs assessments are completed. In some Wisconsin jurisdictions that follow a post-adjudication model, *see* §§ 10.24–.32, *infra*, the treatment court judge determines eligibility based on the objective criteria, and the sentencing judge makes the ultimate decision on whether the applicant is appropriate for the treatment court. In other jurisdictions, the treatment court judge is not involved in the admission process at all. In Milwaukee County's adult drug treatment court, for example, once the treatment court team receives the results of the risk and needs assessments, the team typically meets to determine the appropriateness of the individual for treatment court.

D. Promotion of Equity and Inclusion in Treatment Courts [§ 10.23]

Both NADCP's Adult Drug Court Best Practices Standards and WATCP's Wisconsin Treatment Court Standards have a standard devoted solely to equity and inclusion, which emphasizes, in part, that eligibility criteria for treatment courts should be nondiscriminatory in intent and impact. *Adult Drug Court Best Practice Standards* 2018, *supra* § 10.14, at 11; *Wisconsin Treatment Court Standards* 2018, *supra* § 10.6, at 3. In addition, both sets of standards address the effects of the "violent offenders" exclusion from treatment courts.

As background, drug treatment court programs have excluded persons charged with, or who have a history of, violent offenses and firearm offenses, because many treatment courts have been recipients of either the Federal Government's Drug Court Discretionary Grant Program or the Wisconsin's TAD grants. Hardin & Fox, *Getting Started*, *supra* § 10.22, § 2.13. The Drug Court Discretionary Grant Program prohibits the use of federal dollars to serve persons who meet the federal definition of a "violent offender." 34 U.S.C §§ 10611–10613. Wisconsin also prohibits use of state grant dollars to serve "violent offenders." Wis. Stat. § 165.95(3)(c).

Under federal law, a violent offender includes any person whose pending offense—the offense that is currently bringing that person to the treatment court—is a felony offense involving the use of a firearm or dangerous weapon, death or serious bodily injury to another person, or force against another person. 34 U.S.C. § 10613(a). A violent offender also includes any person who has a prior felony conviction involving the use or attempted use of force against a person with the intent to cause death or serious bodily harm. *Id.* Wisconsin's definition of violent offender is almost identical to the federal definition, except that it also includes any person whose pending offense is a misdemeanor offense of violence. *See* Wis. Stat. § 165.95(1)(bg).

Research now suggests that such practice might not be evidence based and in fact has led to racial and ethnic disparities regarding the under-representation of Black and Hispanic or Latino individuals in drug treatment courts. *Adult Drug Court Best Practice Standards* 2018, *supra* § 10.14, at 7–8, 13. While the original rationale to exclude violent offenders may have been linked to concerns of public safety and recidivism, some research supports the conclusion that violent offenders perform as well or better in treatment courts than do nonviolent offenders. *Id.* at 7. Other research also demonstrates that allowing violent offenders into the adult drug treatment court programs leads to greater positive effects on recidivism and cost outcomes. Shannon M. Carey, Juliette R. Mackin & Michael W. Finigan, Nat'l Drug Ct. Inst., *What Works? The Ten Key Components of Drug Court: Research-Based Best Practices*, Drug Ct. Rev. 35 (2012), https://www.ndci.org/wp-content/uploads/DCR_best-practices-in-drug-courts.pdf [hereinafter Carey et al.]. The Adult Drug Court Best Practice Standards indicate that no empirical justification exists to exclude violent offenders from drug treatment courts, if adequate treatment and supervision are available. *Adult Drug Court Best Practice Standards* 2018, *supra* § 10.14, at 8. The same holds true for individuals charged with drug dealing, if the individuals have substance use disorders. *Id.* Treatment court programs are likely to see a shift in their legal eligibility criteria as more research is conducted on this topic.

While treatment courts may rely on national research to guide their policies, they should also collect and analyze their own data to determine whether their policies have any discriminatory impact. Such data collection is paramount to aligning with the eighth key component, which recommends monitoring and evaluation to measure the achievement of program goals and to gauge effectiveness. To facilitate such data collection, the Wisconsin Department of Justice (DOJ) created the Comprehensive Evaluations, Outcomes and Reporting (CORE) system. Crim. Just. Coordinating Council, *TAD Program Report* 2020, *supra* § 10.14, at 12. The CORE system is an integrated tool used to collect data on treatment court participants and to allow treatment courts to monitor the progress of their programs. *Id.* The *Equity and Inclusion Assessment Tool*, created by the National Drug Court Institute and the National Center for State Courts, is another tool used by treatment courts to input their data and to measure inclusiveness. Nat'l Drug Ct. Institute, Equity and Inclusion Assessment Tool, https://www.ndci.org/resource/training/equity/#equity (last visited Apr. 29, 2021). The Equity and Inclusion Assessment

Tool may be downloaded from the website. Information gleaned from the data may then be used to improve program outcomes for participants of diverse race, ethnicity, gender identity, age, and sexual orientation. *Id.*

VI. Different Adjudication Models [§ 10.24]

A. Types of Models [§ 10.25]

1. In General [§ 10.26]

Treatment court programs that involve a criminal docket generally follow one of four types of adjudication models: (1) pre-plea diversion; (2) post-plea, pre-adjudication; (3) post-adjudication, probation; or (4) post-adjudication, probation revocation. Hardin & Fox, *Getting Started*, *supra* § 10.22, § 2.14.

2. Pre-Plea Diversion Model [§ 10.27]

In the pre-plea diversion model, the case is charged and the participant enters into the treatment court prior to the plea. Hardin & Fox, *Getting Started*, *supra* § 10.22, § 2.15. The case is then held in abeyance until program completion or termination. *Id.* Upon successful completion, the case is dismissed. *Id.* Upon termination from the program, the case then progresses through the regular criminal process. *Id.* Some programs that follow a pre-plea diversion model may require the participant to sign a stipulation of facts, essentially confessing to the crime, to avoid the evidence going "cold" while the case is held in abeyance. *Id.* § 2.16.

3. Post-Plea, Pre-Adjudication Model [§ 10.28]

Another adjudication model is the post-plea, pre-adjudication model, otherwise commonly referred to as a deferred entry of judgment. Hardin & Fox, *Getting Started*, *supra* § 10.22, § 2.17. Under this model, the participant enters a formal plea and the case is then held in abeyance during the pendency of the treatment court program. *Id.* If the participant successfully completes the program, the participant may be offered a dismissal of the charge(s), an amendment to a lesser charge, a reduced sentence than what would have been originally recommended, or some combination. *Id.* Upon termination from the program, the participant proceeds to sentencing on the charge to which the participant pleaded guilty. *Id.*

4. Post-Adjudication, Probation Model [§ 10.29]

In the post-adjudication, probation model, the participant pleads guilty and is sentenced to probation. Hardin & Fox, *Getting Started*, *supra* § 10.22, § 2.18. As a condition of probation, the participant must successfully complete the treatment court program. Upon successful completion, the participant may earn early discharge from probation. Upon termination from the treatment court program, the participant may be revoked from probation or face other consequences. *Id.*

5. Post-Adjudication, Probation Revocation Model [§ 10.30]

In the post-adjudication, probation revocation model, the participant enters the treatment court program as a response to a probation violation or as a condition of an alternative to revocation. Hardin & Fox, *Getting Started*, *supra* § 10.22, § 2.19. Upon successful completion of the treatment court program, the participant may earn early discharge from probation. *Id.* Upon termination from the treatment court program, the participant may be revoked from probation and may serve a jail or prison sentence. *Id.*

B. Evaluation of Advantages and Disadvantages [§ 10.31]

When establishing a program, a treatment court should evaluate the advantages and disadvantages of each type of model and then choose a model to fit the court's needs and its availability of treatment and supervision resources. One advantage of the pre-plea, diversion model is faster case processing, but disadvantages include the evidence in the case going stale and prosecutors who may not be willing to offer a pre-plea diversion to those with more serious offenses or histories of them. Hardin & Fox, *Getting Started*, *supra* § 10.22, § 2.15. One advantage of the post-plea, pre-adjudication model is that the case does not go stale because the participant has already entered the guilty plea. *Id.* § 2.17. Another advantage is that more serious offenders may be given the opportunity to participate in the program; however, a disadvantage is that this model requires more time for due-process hearings to take place, such as the preliminary hearing and the plea colloquy. *Id.*

Similar to the advantages of the post-plea, pre-adjudication model, the advantages of the post-plea, probation model are the case not going stale and more opportunities for more serious offenders; however, several disadvantages of this model include the greater time for due-process hearings, including the sentencing, and fewer "carrots" or incentives for the participant, given that dismissal of the charge or a reduced charge are not viable options. *Id.* § 2.18. The probation revocation model is an opportunity to provide an alternative to revocation, but a disadvantage is that, like the probation model, there are fewer incentives to provide the participant. The probation revocation model also severely limits eligibility to only those who are facing a probation violation or are being offered an alternative to revocation.

Evidence does not show that one particular model is superior to the other models. *Id.* § 2.20. However, research suggests that outcomes are better when the court has a degree of "coercive leverage" over the participants. *Id.* Therefore, outcomes are poorer under the pre-plea, diversion model where the participant is placed in the same starting position upon termination from the program as when the case was first charged. *Id.* Research conflicts as to whether sticking with one consistent model among participants creates better outcomes. Carey et al., *supra* § 10.23, at 36. However, if different models are employed, treatment courts are encouraged to create separate tracks with specific policies and procedures that are tailored to the risk and needs levels of the participants in each track. Hardin & Fox, *Getting Started*, *supra* § 10.22, § 2.20. The Risk and Need Quadrant Model is an excellent starting point to understand the varying optimal levels of treatment and court oversight for participants in four basic tracks: high risk and high need, high risk and low need, low risk and high need, and low risk and low need. *See* Nat'l Ass'n of Drug Ct. Pros., *Risk & Need Quadrant Model*, https://ark.nadcp.org/about-the-ark/risk-&-need-quadrant-model/ (last visited Apr. 29, 2021).

C. Phases and Tracks [§ 10.32]

A treatment court program that provides different tracks should not mix participants with different risk or needs levels, either in court or in treatment groups, because such mixing can be detrimental to the low-risk or low-need participants by exposing them to antisocial peers or by discouraging engagement in pro-social activities like work or school. *Adult Drug Court Best Practice Standards* 2018, *supra* § 10.14, at 7. As a practical tip, a treatment court whose program involves various tracks should ideally have separate court dates for the participants in each track to minimize the mingling of the participants while they wait for their case to be called on the record.

Whether a treatment court adopts one adjudication model or several models, the treatment court program for high-risk, high-need participants is typically separated into phases and should be no less than 12 months long. *Wisconsin Treatment Court Standards* 2018, *supra* § 10.6, at 24. The treatment court program selects the number of phases and the objective criteria to be achieved during each phase of the program based on the risks and needs of its participants. Hardin & Fox, *Getting Started*, *supra* § 10.22, § 2.22. As an example, in a drug treatment court program, the first phase may focus on stabilization and orientation to the program. The second phase may focus on early recovery and additional treatment planning. The third phase may focus on integration back into the community and relapse prevention. The fourth phase usually focuses on maintenance, aftercare, and graduation from the program. Depending on the type of treatment court, abstinence for a set number of days may be required before advancing to the next phase. *Wisconsin Treatment Court Standards* 2018, *supra* § 10.6, at 24. Best practices for traditional drug treatment courts require a minimum of 90 days of documented sobriety, as monitored by frequent drug testing, to graduate. Hardin & Fox, *Getting Started*, *supra* § 10.22, § 2.21.

VII. Roles and Responsibilities of Treatment Court Team Members [§ 10.33]

A. In General [§ 10.34]

Another one of the Ten Key Components of a treatment court is that "a coordinated strategy governs drug court responses to participants' compliance." *Defining Drug Courts*, *supra* § 10.17. This key component reflects the important role that collaboration among system partners plays in treatment courts. Unlike the traditional criminal justice system model, the judge is not just rendering a final decision on the record in the courtroom after hearing arguments from the prosecution and the defense. Instead, while a judge still conducts court review hearings with the participants on the record, much of the judge's responsibilities are carried out behind the scenes in collaboration with the other team members.

B. Court Staffing [§ 10.35]

Before a court review hearing occurs, the judge attends a private, off-the-record court staffing with the rest of the team members. The staffing is a crucial component of a treatment court during which the judge is updated regarding the participants' behaviors and activities. All team members, drawing from their expertise and perspectives, then discuss each participant to determine what more can be done to help the participant achieve his or her goals. The judge ultimately decides an appropriate response to the participant's behaviors based on input from the team members. The judge's response is usually two-fold: a behavioral response in the form of incentives, sanctions, or both (described in more detail in section 10.41, *infra*); and a therapeutic response in the form of an adjustment to treatment or services, if

necessary. *Adult Drug Court Best Practice Standards* 2018, *supra* § 10.14, at 27. The judge heavily relies on the treatment providers' recommendations when determining any therapeutic responses. *Id.* Research has demonstrated that full attendance by treatment court team members at staffings and court hearings increases cost-effectiveness and decreases recidivism. Carey et al., *supra* § 10.23, at 19.

C. Approaches and Responsibilities [§ 10.36]

While the team's focus will be on different areas such as mental health or substance use depending on the type of treatment court, the team should be mindful not to create silos out of people's various disorders but to consider each participant holistically. Drug treatment court judges are known to tell participants that their court is not just a "sobriety court" but is more akin to a "wellness court." A treatment court that focuses on the person holistically not only will expect sobriety or compliance with medications but also will encourage pro-social activities such as employment or community service, if possible, and healthy living habits such as healthy eating, positive relationships, and exercise.

Treatment court team members also have a responsibility to deliver services, and to interact with participants, using a trauma-informed approach. Studies of people in the juvenile and criminal justice system reveal not only high rates of mental and substance use disorders but also high rates of personal histories of trauma. Substance Abuse & Mental Health Servs. Admin., Trauma & Just. Strategic Initiative, *SAMSHA's Concept of Trauma and Guidance for a Trauma-Informed-Approach* 2 (July 2014), https://ncsacw.samhsa.gov/userfiles/files/SAMHSA_Trauma.pdf. Unsurprisingly, then, trauma is said to be an almost universal experience of people with mental and substance use orders. *Id.* When trauma goes unaddressed, the risk of substance use and mental health disorders significantly increases. *Id.* Addressing trauma is now viewed as an important component of effective behavioral health service delivery. *Id.* Therefore, treatment courts should be discovering the personal trauma histories of each of their participants and addressing such trauma as part of their delivery of services to participants.

D. Teams [§ 10.37]

A treatment court team typically is made up of the following core individuals: judge, prosecutor, defense attorney (depending on the adjudication model), treatment court coordinator, case manager, law enforcement officer, probation officer (depending on the adjudication model), and ideally, an independent evaluator. Hardin & Fox, *Getting Started*, *supra* § 10.22, § 2.4. Additional team members may include a peer support coordinator, a representative from the behavioral health division or department, a psychologist or psychiatrist, treatment providers, and managers of sober-living facilities or transitional housing.

In keeping with the 10th key component of a treatment court, relating to forging community partnerships, treatment courts are also encouraged to invite members of the public, media, and business community to attend some team meetings in order to receive their input and to educate them about the treatment court program. *Id.* § 2.25. Other examples of maintaining community relations include inviting public and county officials to treatment court graduations, attending recovery community events, and giving presentations on the treatment court to community groups. Research demonstrates that treatment courts have better outcomes when they maintain community relations. *Id.*

The following table summarizes the various members and their typical respective roles on a treatment court team.

Table A: Treatment Court Team Members

Title	Role
Judge	Leads team members, presides over staffings and court review hearings, and determines the appropriate court responses, including incentives and sanctions, with input from team members.
Prosecutor	Prosecutes the participant, represents the interests of the state of Wisconsin, communicates the voice of any victim, evaluates program eligibility, and seeks dispositions that promote both participant success and the community's interest in public safety.
Defense Counsel	In the pre-adjudication model, legally represents the participant, advocates for the participant's admission to and continued success in the program, safeguards the participant's rights, and seeks dispositions that facilitate the participant's success and rehabilitation. In the post-adjudication model, the public defender representative to the treatment court team does not represent the participant but plays a narrower role of ensuring the participants' rights are protected. See section 10.44, *infra*, for discussion of a treatment court participant's right to counsel.

Treatment Court Coordinator	Organizes referrals to the treatment court program, serves as the primary point of contact for the program, maintains records related to the daily operation and effectiveness of the program, and ensures the program complies with its policies and procedures, as well as with those promulgated by WATCP and NADCP.
Case Managers or Probation Officers	Provides support to participants, monitors participants' progress, coordinates services for participants, and advises the team of participants' compliance.
Law Enforcement Officer	Performs home visits, conducts welfare checks, seeks and arrests participants in bench warrant status, and attends staffings.
Evaluator	Tracks data and provides quarterly updates and year end reports on the treatment court program. The evaluator facilitates adherence to the eighth key component of a treatment court relating to measuring the achievement of program goals and gauging effectiveness.
Peer Support Coordinator	Attends staffings, offers input and perspective to the treatment court, and manages and trains a team of peer mentors.
Psychologist or Psychiatrist	Performs mental health assessments for participants as needed, attends staffings, and provides ongoing mental health consultation.
Behavioral Health Division Representative	Coordinates and funds community-based rehabilitative and ancillary services for participants.

Of special note, case managers may be called something different depending on the type of treatment court and the adjudication model. For example, in a post-adjudication model, the probation agent may serve as the case manager. In veterans treatment court, a veterans justice outreach coordinator, employed by the U.S. Department of Veterans Affairs (VA), may serve as the case manager. The veterans justice outreach coordinator is especially knowledgeable in VA health-care eligibility and helps eligible veteran participants link up to VA services. In some jurisdictions, the treatment court coordinator may serve as the case manager. (This is not ideal but might be necessary because of limited resources.) Some jurisdictions, such as Milwaukee County, offer a recovery support coordinator whose role supplements the case manager's role by specifically focusing on recommending treatment plans for participants and then coordinating participants' access to services. In mental health treatment court, the community case manager, through the behavioral health department, may serve as the case manager.

Treatment providers also play an important role by either preparing written progress reports or providing verbal reports at staffings relating to the participants' progress in treatment. Managers from local sober-living facilities or transitional housing also provide significant insight relating to the participants' progress. Additional team members may also include other community organizations, such as, in veterans treatment court, representatives from the Wisconsin Department of Veterans Affairs and other veterans' service organizations.

VIII. Role of the Treatment Court Judge [§ 10.38]

A. In General [§ 10.39]

An effective treatment court judge plays many roles, including leader, communicator, educator, community collaborator, and institution builder. *Wisconsin Treatment Court Standards* 2018, *supra* § 10.6, at 8. In the roles of leader, communicator, and educator, the judge is expected to have ongoing interaction with the participants, which, as noted earlier, is one of the key components of a treatment court. Research suggests that, for best outcomes, drug treatment court participants should attend court review hearings with the judge at least every two weeks (for high-risk participants) for at least the first three to six months of the program, and the judge should spend at least three minutes with each participant during the court review hearings. Douglas B. Marlowe, Nat'l Drug Ct. Inst., *Applying Incentives and Sanctions*, *The Drug Court Judicial Benchbook* § 7.4 (2017) [hereinafter Marlowe, *Applying Incentives and Sanctions*]; Carey et al., *supra* § 10.23, at 10; William G. Meyer & Jeffrey Tauber, Nat'l Drug Ct. Inst., *The Roles of the Drug Court Judge*, *The Drug Court Judicial Benchbook*, § 3.3 (2017). The research is currently unclear as to how frequently court hearings should be scheduled for other populations, such as people with mental illness or juveniles who have been adjudicated delinquent. Marlowe, *Applying Incentives and Sanctions*, *supra*, § 7.4.

For a treatment court judge, the good news (or bad news) is that the judge actually makes a difference in program outcomes. Meyer & Tauber, *supra*, § 3.3. In one survey conducted by the Drug Court Clearinghouse and American University, 80% of the drug treatment court participants surveyed stated they would not have stayed in the program if they had not appeared before a judge as part of the process. *Id.* (citing U.S. DOJ, *Summary Assessment of the Drug Court Experience, Drug Court Clearinghouse & Tech. Assistance Project* (1996)).

B. Motivational Interviewing [§ 10.40]

Because judges have tremendous ability to influence program outcomes, either positively or negatively, they must take great care to develop effective communication and expertise in the knowledge of addiction and other behavioral health problems. Any judge stepping into the role of a treatment court judge is encouraged to become proficient in "motivational interviewing," which is an entire field of study focused on an evidence-based approach to change. MINT, *Understanding Motivational Interviewing*, https://motivationalinterviewing.org/understanding-motivational-interviewing (last visited Apr. 29, 2021). Motivational interviewing is defined as a collaborative, goal-oriented style of communication that is "designed to strengthen personal motivation for and commitment to a specific goal by eliciting and exploring the person's own reasons for change within an atmosphere of acceptance and compassion." William R. Miller & Stephen Rollnick, *Motivational Interviewing: Helping People Chang*e 29 (3d ed. 2013).

Key qualities of motivational interviewing include (1) a guiding style of communication that seeks a balance between active listening and providing advice and information; (2) communication that empowers individuals by eliciting their own purpose, significance, and ability to change; and (3) respectful and curious communication that respects the natural process for change and individual autonomy. MINT, *supra*. While the topic of motivational interviewing could be explored further, the rule of thumb is the following: If the judge is doing all the talking while giving advice and is not listening to, and being curious about, the participant's goals and life purpose, then the judge is doing it all wrong.

C. Applying Incentives and Sanctions [§ 10.41]

The treatment court judge, after collaboration with treatment court members, also has the task of deciding and implementing incentives and sanctions as a means to effect behavior change. Examples of incentives include verbal praise, recognition as the "person of the week," certificates of achievement for phase advancement, graduation diplomas, transportation passes, and gift cards to local stores or restaurants. Examples of sanctions include verbal warnings, more frequent court hearings, writing assignments about the noncompliant behavior, community service, and jail. For a more complete list of incentives and sanctions, see Nat'l Ass'n of Drug Ct. Pros., *Lists of Incentives and Sanctions*, https://www.ndci.org/wp-content/uploads/2020/12/Incentives-and-Sanctions-List.pdf (last visited Apr. 29, 2021).

The treatment court judge must be mindful to separate incentives and sanctions from therapeutic adjustments. Participants who are complying with treatment and supervision but are otherwise not responding to treatment should receive a therapeutic adjustment and not a sanction. *Adult Drug Court Best Practice Standards* 2018, *supra* § 10.14, at 27. In such cases, the treatment court judge should respond with an adjustment to the participant's treatment plan based on the clinical recommendations of duly trained treatment professionals. *Id.* Furthermore, treatment adjustments should not be used as an incentive to reward desired behaviors. *Lists of Incentives and Sanctions*, *supra*, at 1.

When deciding on and implementing incentives and sanctions, the treatment court must keep in mind four key features to promote the most positive outcomes: certainty, immediacy, magnitude, and fairness. The certainty feature relates to the certainty that the treatment court will respond to every single achievement or infraction with some type of incentive or sanction. Marlowe, *Applying Incentives and Sanctions*, *supra* § 10.39, § 7.2. As to immediacy, the efficacy of incentives and sanctions begins to decline within hours or days after the behavior because of interference from new behaviors; this fact is why court review hearings are recommended at least biweekly and why the judge does not have to wait until the next scheduled court hearing, and should be encouraged to schedule an earlier court hearing with the participant, to immediately address the behavior. *Id.* § 7.4.

Regarding magnitude, the judge must be careful to find a delicate balance between low- and high-magnitude rewards and sanctions. Research suggests that a too lenient sanction may lead to habituation, in which a participant becomes accustomed to being sanctioned and over time becomes desensitized to the threat of inconsequential sanctions. *Id.* § 7.5. On the other hand, sanctions that are too high in magnitude may lead to ceiling effects, in which additional escalation of sanctions becomes impracticable. *Id.* For example, once a participant receives a jail sanction, the court has in its toolbox no sanctions that are more severe (short of termination, or threat of termination, from the program), thereby leading to future futile efforts to change the participant's behavior. *Id.* Therefore, treatment courts are encouraged to create a wide list of intermediate-magnitude rewards and sanctions that can be adjusted upward or downward in response to a participant's escalated progress or noncompliance throughout the program. *Id.* For best outcomes, the general rule of thumb has been to adhere to an incentives-to-sanctions ratio of 4 to 1, meaning for every 1 sanction the judge imposes, the judge provides 4 incentives. *Wisconsin Treatment Court Standards* 2018, *supra* § 10.6, at 28. Other research, however, suggests that providing an equal number of incentives and sanctions for participants is sufficient. Douglas B. Marlowe, Nat'l Drug Ct. Inst., *Behavior Modification 101 for Drug Courts: Making the Most of Incentives and Sanctions* 2 (Sept. 2012), https://www.watcp.org/wp-content/uploads/2015/03/BehaviorModification101forDrugCourts.pdf. The incentive can be as small as a word of praise or encouragement.

When deciding upon the level of a sanction or incentive, treatment courts are also encouraged to keep in mind the concept of proximal and distal goals. A proximal goal is a behavior that the participant is already capable of engaging in, such as attending treatment, while a

distal goal is desired behavior that may take a participant time to accomplish, such as long-term sobriety. Marlowe, *Applying Incentives and Sanctions*, *supra* § 10.39, § 7.9. Higher-magnitude sanctions should be administered for failure to meet proximal goals, while lower-magnitude sanctions should be administered for failure to meet distal goals. *Id.* The converse applies to incentives; lower-magnitude incentives should be awarded for achievement of proximal goals and higher magnitude incentives should be administered for achievement of distal goals. *Id.* The highest-magnitude sanction is jail. Research suggests that jail sanctions of less than six days lead to better outcomes in terms of recidivism and cost savings. Carey et al., *supra* § 10.23, at 33.

Some treatment courts, such as Milwaukee County's adult drug treatment court, create and rely on a "behavioral matrix" to inform their responses to participants' behaviors. A behavioral matrix reinforces the certainty, consistency, and predictability of a response by providing an acceptable range of responses for varying levels of compliance and noncompliance. Another benefit of the behavioral matrix is that, depending on the level of compliance or noncompliance, it empowers case managers to respond more immediately than the judge could respond by choosing from a previously agreed-upon range of responses.

When imposing a sanction, the judge's delivery is just as important to the perception of fairness as is the content of the decision. The judge should be very clear as to which behavior is being sanctioned, why the behavior matters to the participant's recovery, and why the particular sanction was selected. William G. Meyer & Jeffrey Tauber, Nat'l Drug Ct. Inst., *The Roles of the Drug Court Judge*, *The Drug Court Judicial Benchbook* § 3.3 (2017) As to the delivery, participants are more likely to accept the sanction if they had an opportunity to tell their side of the story, were treated the same as other participants in similar circumstances, and were treated with respect and dignity. Marlowe, *Applying Incentives and Sanctions*, *supra* § 10.39, § 7.7.

While a treatment court judge often steps out of the more traditional role of a neutral arbiter, at the end of the day, the treatment court judge is still presiding over a court of law in which all constitutional and statutory rights are still afforded to the participant. In fact, the second key component of drug treatment courts reinforces that, while treatment courts use a non-adversarial approach, both prosecution and defense counsel must protect participants' due-process rights. A treatment court judge must also be mindful of ethical and confidentiality duties under the law. Those additional legal considerations are explored in sections 10.42–.47, *infra*.

IX. Special Legal Considerations in Treatment Courts [§ 10.42]

A. In General [§ 10.43]

Though a treatment court and its processes depart greatly from the standard, adversarial approach to the justice system, a treatment court is still a court of law that must adhere to all constitutional, statutory, and procedural requirements. While most people agree that many benefits are associated with treatment courts, a few areas that have come under scrutiny since their inception are the protection of participants' rights to due process and confidentiality and treatment court judges' legal and ethical obligations to both participants and victims. An entire chapter could be devoted to these topics alone; however, in the interest of brevity, this section focuses on the following areas that either Wisconsin law or recommended best practices in Wisconsin have specifically addressed: (1) ex parte communications and right to counsel, (2) confidentiality, (3) victims' rights under Marsy's Law, and (4) a judge's obligation of fairness and impartiality.

B. Ex Parte Communications and Right to Counsel [§ 10.44]

Issues related to the right to counsel and ex parte communications have arisen in the context of treatment courts because, depending on the adjudication model, participants are not always represented by an attorney. U.S. Const., amend. VI, and Wis. Const., art. I, § 7, guarantee the right to counsel to all defendants in a criminal prosecution. *State v. Forbush*, 2011 WI 25, ¶ 13, 332 Wis. 2d 620, 796 N.W.2d 741. The right to counsel attaches at or after the time adversarial judicial proceedings have been initiated against the defendant and extends to all critical stages of criminal proceedings. *Id.* ¶¶ 14–15.

Probation is not considered a critical stage of the criminal proceeding; therefore, a probationer does not have a constitutional right to counsel and has fewer due-process rights than someone who has not been convicted of a crime. *State ex rel. Griffin v. Smith*, 2004 WI 36, ¶ 22, 270 Wis. 2d 235, 677 N.W.2d 259. However, under Wisconsin law, a probationer does have a statutory right to counsel at a probation revocation hearing. *Id.* ¶ 24. A probationer also has a right to counsel at a hearing to modify the probation terms when confinement to the county jail is a potential modification. *State v. Hays*, 173 Wis. 2d 439, 447, 496 N.W.2d 645 (Ct. App. 1992).

For treatment courts following a pre-adjudication model, all participants must be represented by an attorney at every treatment court hearing, given that every hearing is still considered a stage of the criminal proceedings. For those treatment courts following a post-adjudication model in which the participants are on probation, the participants are not required to be represented by an attorney, except at probation revocation or modification hearings. Because treatment-court-termination hearings are analogous to probation revocation

hearings, and because treatment-court-sanction hearings are analogous to probation modification hearings, treatment court participants should be afforded counsel, absent a waiver, at both a termination hearing and a sanction hearing. William G. Meyer, Nat'l Drug Ct. Inst., *Constitutional and Legal Issues in Drug Courts*, *The Drug Court Judicial Benchbook* § 8.9 (2017).

Given that participants in a post-adjudication model are not necessarily represented by counsel, concerns have also arisen relating to ex parte communications. Treatment court judges must have the ability to confer, outside the presence of the participant, with the treatment court team during staffings without violating their ethical obligation to refrain from ex parte communications. In response to such concern, Wisconsin expressly allows such ex parte communications. Specifically, SCR 60.04(1)(g)6. allows the treatment court judge to engage in ex parte communications with the other treatment court team members provided the defendant knowingly waives such communications. A treatment court judge should therefore be sure to obtain such waiver at the time of the participant's entry into the treatment court. For a sample waiver regarding confidentiality and ex parte communications, see *Wisconsin Treatment Courts: Best Practices for Record-Keeping, Confidentiality & Ex Parte Information* 26–28 (Dec. 2011), https://www.wicourts.gov/courts/programs/docs/treatmentbestpractices.pdf [hereinafter *Best Practices for Record-Keeping, Confidentiality & Ex Parte Information*]. When a participant is represented by counsel, however, the treatment court judge should make every effort to include both the state's attorney and the defense attorney on all communications. *Id.*

C. Confidentiality [§ 10.45]

Another concern that arises in treatment courts is the confidentiality of the participant's treatment records in light of seemingly conflicting obligations under federal regulations governing AOD treatment and Wisconsin laws relating to public records and open criminal proceedings. *Best Practices for Record-Keeping, Confidentiality & Ex Parte Information*, *supra* § 10.44, at 7. The Wisconsin committee that drafted the *Best Practices for Record-Keeping, Confidentiality & Ex Parte Information* recommends that a treatment court develop a bifurcated filing system in which the complete record of judicial action is maintained in the open court file and any information related to the participant's diagnosis, treatment, progress, and related medical and psychological information is contained in a confidential treatment file. *Id.* at 11. Furthermore, given the consensus that treatment court proceedings must be open to the public and be taken on the record, the treatment court judge must take great caution when referring on the record to confidential information learned during the off-the-record court staffings. *Id.* at 14 ("Given the strong case law favoring open courtrooms and the strong public interest in the resolution of criminal cases, treatment court proceedings should be open to the public" and there is no applicable exception in SCR 71.01 to taking the record in a criminal case).

D. Victims' Rights Under Marsy's Law [§ 10.46]

A treatment court judge must protect both the participants' rights and the rights of any victim on a case before the judge. With the ratification of an amendment to the Wisconsin Constitution by a majority of Wisconsin voters, known as Marsy's Law, which went into effect on May 4, 2020, many of the rights afforded to victims under the Wisconsin Constitution and Wis. Stat. ch. 950 have either been duplicated or expanded. David Perlman, *Marsy's Law: Amendment to the Wisconsin Constitution* 1, http://courtnet.wicourts.gov/education/oje/docs/marsyslawsynopsis.pdf. For an in-depth discussion regarding Marsy's Law in Wisconsin, see Amber Peterson, *Guidance Related to Marsy's Law—Wisconsin Constitution Art. I, § 9m* (May 12, 2020), http://courtnet.wicourts.gov/policies/docs/marsyslaw.pdf, and Rebecca M. Donaldson et al., *Marsy's Law: Change for Crime Victims?*, Wis. Law. (Sept. 2020), https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=93&Issue=8&ArticleID=27930. While Marsy's Law currently remains in effect pending appeal, the manner in which the law was enacted has been the subject of a legal challenge that will likely make its way to the Wisconsin Supreme Court. *See Wisconsin Just. Initiative v. Wisconsin Elections Comm'n*, No. 2019-CV-3485 (Dane Cnty. Cir. Ct. Nov. 3, 2020), *appeal docketed*, No. 2020AP2003 (Wis. Ct. App. Dec. 2, 2020).

In particular, treatment court judges must be aware of the following three changes.

First, Marsy's Law made the victim's right to privacy a stand-alone, self-executing right, thus emphasizing the importance of treatment court judges being as protective of a victim's confidential information as they are of a participant's confidential information. *See* Perlman, *supra*, at 2; Peterson, *supra*, at 4; *compare* Wis. Const. art. I, § 9m (amended 2020), *and* Wis. Stat. § 950.04(1v)(ag), *with* Wis. Const. art. I, § 9m(2)(b).

Second, Marsy's Law expanded a victim's constitutional right from attending "all court proceedings" except when sequestration was appropriate to, upon request, attending "all proceedings involving the case" without exceptions. *Compare* Wis. Const. art. I, § 9m (amended 2020), *and* Wis. Stat. § 950.04(1v)(b), *with* Wis. Const. art. I, § 9m(2)(e). Notably, the change in language from "all court proceedings" to "all proceedings involving the case" raises the question whether a right to attend a broader array of proceedings, such as those proceedings that occur out of the courtroom, was intended by the elimination of the word "court" before "proceedings." Peterson, *supra*, at 9. No legal

authority in Wisconsin has interpreted this constitutional right as affording victims the right to attend off-the-record treatment court staffings. However, this constitutional right is one reason treatment courts should limit the number of other off-the-record hearings and should hold treatment court review hearings in public and on the record. *See* Perlman, *supra*, at 2.

Third, Marsy's Law expanded a victim's right to speak during hearings. Before the enactment of Marsy's Law, the Wisconsin Constitution afforded victims the right "to make a statement to the court at disposition." Wis. Const. art. I, § 9m (amended 2020). Wisconsin statutes, which remain unchanged with the enactment of Marsy's Law, afford victims the right to provide statements regarding "sentencing, disposition or parole," Wis. Stat. § 950.04(1v)(m), as well as statements regarding modification of sentence, Wis. Stat. § 950.04(1v)(nt), modification of a term of probation, Wis. Stat. § 950.04(1v)(nx), and pardon applications, Wis. Stat. § 950.04(1v)(z). With the enactment of Marsy's Law, the Wisconsin Constitution now affords victims the right "to be heard in any proceeding during which a right of the victim is implicated, including release, plea, sentencing, disposition, parole, revocation, expungement, or pardon." Wis. Const. art. I, § 9m(2)(i). Given the breadth of this language regarding "any proceeding during which a right of the victim is implicated" and the lack of any guidance regarding the scope of its application, treatment court judges should be mindful to afford victims the opportunity to speak during treatment court review hearings.

E. Fair and Impartial Judge [§ 10.47]

Defendants have a due-process right to a fair and impartial judge, *State v. Marcotte*, 2020 WI App 28, ¶ 16, 392 Wis. 2d 183, 943 N.W.2d 911, and judges have an ethical obligation to be fair and impartial, SCR 60.04(1)(hm). While serving as a treatment court judge, the judge undoubtedly becomes more familiar with the participants compared with other traditional defendants in the courtroom. The judge is often privy to additional information about the participant that is learned during off-the-record court staffings and, if the participant is not represented by an attorney, such information is gleaned during ex parte communications. *Marcotte*, 2020 WI App 28, ¶ 32, 392 Wis. 2d 183. Judges may also become involved and invested in promoting behavior change among their participants and can often form strong emotional connections with them. *Best Practices for Record-Keeping, Confidentiality & Ex Parte Information*, *supra* § 10.44, at 9. Because of such familiarity and involvement, the oft-debated question is whether the participant's due-process right to a fair and impartial judge can be respected when the treatment court judge presides at the sentencing of the participant after termination from the program. *See, e.g.*, Evan C. Tsai, *The Practitioner's Guide to Due Process Issues in Veterans Treatment Courts*, 43 Mitchell Hamline L. Rev. 577, 611–13 (2017).

Before 2020, Wisconsin law provided no definitive direction on the topic of best practices related to sentencing after termination. *Best Practices for Record-Keeping, Confidentiality & Ex Parte Information*, *supra* § 10.44, at 9. In February 2020, the Wisconsin Court of Appeals declined to create a per se rule prohibiting a treatment court judge from presiding at the sentencing after termination from the program; rather, the court held that whether a judge is objectively biased must be examined on a case-by-case basis examining all of the circumstances. *Marcotte*, 2020 WI App 28, ¶ 40, 392 Wis. 2d 183. The court, however, cautioned that significant impartiality issues arise when the treatment court judge presides at the participant's sentencing after termination and advised that it would be a better practice either to have a different judge preside over the sentencing after termination or to avoid the need for sentencing after termination altogether (in those cases where the program follows a post-adjudication probation model) by imposing a stayed sentence instead of a withheld sentence before entry into the program. *Id.* ¶ 42. At the very least, the *Marcotte* court seemed to suggest that, absent any other factors supporting objective bias, a treatment court judge should conduct a comprehensive waiver colloquy if the judge decides to preside over the sentencing after termination. *Id.* ¶ 39.

X. The Future of Treatment Courts and Conclusion [§ 10.48]

As treatment courts continue to evolve, it would come as no surprise if the name "treatment court" were changed to "healing to wellness court," following the model of the tribal healing to wellness courts, in recognition that treatment courts, at their core, are about restoring the entire being to health and wellness. Emerging research about trauma-informed care, promotion of racial equity and inclusion, and treatment of the whole person (not just the addiction or disorder) will continue to inform the policies and procedures of treatment courts.

For those attorneys who have the opportunity to practice in treatment courts, the experience will be challenging, rewarding, and like no other type of legal practice. This chapter serves as a starting point for those attorneys and all others who want to become informed about and practice in treatment courts. To take a deeper dive into treatment courts, attorneys are encouraged to review the resources identified in the appendix, *infra* section 10.49.

XI. Appendix: Additional Resources [§ 10.49]

For links to some of the sources cited in this chapter and to additional materials related to treatment courts, visit the Drug & Alternative Treatment Courts legal topics page at https://wilawlibrary.gov/topics/justice/drugcourts.php (last updated Feb. 9, 2021).

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[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 25; and all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-11 (Apr. 23, 2021).

[2] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 25; and all references to the Wisconsin Administrative Code are current through Wis. Admin. Reg., Mar. 2021, No. 783.

[3] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 25; and all references to form numbers are to mandatory Wisconsin circuit court forms, as updated through Apr. 20, 2021.

[4] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 30; all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-12 (May 4, 2021); and all references to the Code of Federal Regulations (C.F.R.) are current through 86 Fed. Reg. 22,825 (Apr. 29, 2021).

[5] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 30; and all references to supreme court rules (SCR) are to the rules as amended by supreme court orders issued through Apr. 23, 2021.

[6] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 24; all references to the Wisconsin Administrative Code are current through Wis. Admin. Reg., Mar. 2021, No. 783; and all references to the Code of Federal Regulations (C.F.R.) are current through 86 Fed. Reg. 18,215 (Apr. 8, 2021).

[7] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 24; all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-6 (Mar. 30, 2021); and all references to the Code of Federal Regulations (C.F.R.) are current through 86 Fed. Reg. 18,215 (Apr. 8, 2021).

[8] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 30; all references to the Wisconsin Administrative Code are current through Wis. Admin. Reg., Apr. 2021, No. 784; all references to the United States Code (U.S.C.) and Internal Revenue Code (I.R.C.) are current through Pub. L. No. 117-12 (May 4, 2021); and all references to the Code of Federal Regulations (C.F.R.) and Treasury regulations (Treas. Reg.) are current through 86 Fed. Reg. 26,631 (May 14, 2021).

[9] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 25; all references to supreme court rules (SCR) are to the rules as amended by supreme court orders issued through Apr. 13, 2021; and all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-11 (Apr. 23, 2021).